Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1993

MISSOURI PACIFIC RAILROAD COMPANY d/b/a UNION PACIFIC RAILROAD COMPANY,
Petitioner

v.

GRANT TINGSTROM, III,
Defendant,

APPLICATION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether this Court should summarily reverse the decision of a Louisiana appellate court, left undisturbed by the Louisiana Supreme Court, in which these courts:

1. Disregarded applicable federal law established by this Court in *Sinkler v. Missouri Pacific R. Co.*, 356 U.S. 326, 78 Sup. Ct. 758, 2 L.Ed. 799 (1958); and *Shenker v. Baltimore & Ohio R. Co.*, 374 U.S. 1, 83 S.Ct. 1667, 10 L.Ed. 709 (1963), and held that a railroad employee, injured while on his way to work, must, as a matter of law, be considered within the course of his employment and therefore entitled to maintain an FELA action against his railroad employer.

2. Violated the federal standard of appellate review by ignoring the jury's verdict — which awarded nothing to plaintiff against the defendant Railroad and only $40,000 against a non-FELA co-defendant — and awarding the FELA damages of over $1 million against the Railroad, which included medical expenses nonrecoverable by the plaintiff because it had already been paid under a health and accident policy funded by the Railroad, plus pre-judgment interest of almost $500,000.

In so doing, the courts disregarded relevant federal decisions relating to the medical expenses, *Lines v. So. Pac. Transp. Co.*, 684 F. Supp. 909 (W.D. La. 1988); *Houghton v. Blackships, Inc.*, 462 F.2d 788 (5th Cir. 1972); and *Folkestad v. Burlington Northern, Inc.*, 813 F.2d 1377 (9th Cir. 1987), and this Court's decision in *Monessen Southwestern Ry. Co. v. Morgan*, 486 U.S. 330, 108 S.Ct. 1837, 100 L.Ed.2d 349 (Pa. 1988), which precludes an award of pre-judgment interest in FELA cases.

PARTIES TO THE PROCEEDING

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Union Pacific Corporation and its wholly-owned subsidiary, Union Pacific Holdings Corporation and its wholly-owned subsidiaries, Union Pacific Railroad Company, U. P. Rail, Inc., Missouri Pacific Corporation and its wholly-owned subsidiary, Missouri Pacific Railroad Company.

Missouri Pacific Railroad Company and Subsidiaries and Affiliates:

100% OWNED SUBSIDIARIES and AFFILIATES:

MP Redevelopment Corporation (MPRC)
American Refrigerator Transit Company
Chicago Heights Terminal Transfer Railroad Company
Chicago & Western Indiana Railroad Company
MP Equipment Corporation
Doniphan, Kensett & Searcy Railroad
Missouri Improvement Company
Union Pacific Motor Freight Corporation
Park Spring, Inc.
Stonegate Park, Inc.
Union Pacific Express Air, Inc.
Missouri Pacific Intermodal Transport, Inc.

PARTIALLY-OWNED SUBSIDIARIES AND AFFILIATES:

The Alton & Southern Railway Company
Brownsville & Matamoros Bridge Company
Southern Illinois and Missouri Bridge Company
Houston Belt & Terminal Railway Company

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No. _____

IN THE

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MISSOURI PACIFIC RAILROAD COMPANY d/b/a UNION PACIFIC RAILROAD COMPANY
Petitioner

versus

GRANT TINGSTROM, III,
Defendant,

APPLICATION FOR WRIT OF CERTIORARI

Petitioner prays for a writ of certiorari to review the judgments of the First Circuit Court of Appeal and the Supreme Court of Louisiana in this case.

OPINIONS BELOW

I. Judgment Complained Of:

Tingstrom v. William Smith, et al, ____ So.2d (La. 1st Cir. October 16, 1993) — The opinion of the Louisiana First Circuit Court of Appeal (Docket No. 90/CA/2283R) which reverses its earlier decision and casts applicant in judgment in favor of plaintiff.

II. Other Judgments or Opinions:

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verdict, holding that applicant was not liable to plaintiff.

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Tingstrom v. William Smith, et al, Docket No. 90/CA/2283R, First Circuit, Court of Appeal, State of Louisiana—Applicant's request to the Court of Appeal for a rehearing is denied.

Tingstrom v. William Smith, et al, Louisiana Supreme Court Docket No. 93/C/2776 — Applicant's request for supervisory writs to the Louisiana Supreme Court is denied.

Tingstrom v. William Smith, et al, Louisiana Supreme Court Docket No. 94/C/0031 — Applicant's request for a writ of review to the Louisiana Supreme Court is denied.

Tingstrom v. William Smith, et al, Docket No. _____, First Circuit, Court of Appeal, State of Louisiana—Applicant's request that the First Circuit correct the calculation of interest is denied (The denial was made on March 2, 1994, but the formal notice thereof has not yet reached Applicant).

Tingstrom v. William Smith, et al, Docket No._____, Supreme Court of the United States—Defendant's Application for stay of execution of judgment pending petition for writ of certiorari (March 1, 1994).

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a):

Petitioner seeks a review of a final judgment and decrees of the highest court of the State of Louisiana—the Louisiana Supreme Court—in a case governed by federal law, to wit, the Federal Employers' Liability Act, 45 U.S.C. §51, *et seq.* The judgment sought to be reviewed was handed down by the Louisiana Court of Appeal for the First Circuit on October 16, 1993. The Louisiana Supreme Court refused to review it, by denying Petitioner's Application for a Writ of Review on February 4, 1994, and denying petitioner's Application for a Rehearing on February 25, 1994.

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. CONST. Art. VI:

> "This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made or which shall be made under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Law of any State to the Contrary notwithstanding."

FOURTEENTH AMENDMENT TO THE U.S. CONST.:

> ". . . nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

FEDERAL EMPLOYERS' LIABILITY ACT, 45 U.S.C. §51, *ET SEQ.*

STATEMENT OF THE CASE

Plaintiff Grant Tingstrom, III, a locomotive engineer employed by the Missouri Pacific Railroad Company d/b/a Union Pacific Railroad Company (hereafter "Railroad") sustained questionable injuries while riding in a taxi cab from a motel where he had spent the night, to the Railroad's yard where he was due to resume the operation of a work train used to spray pesticides along the Railroad's right-of-way. He brought this action to recover damages against the Railroad under the Federal Employers' Liability Act (FELA), 45 U.S.C. §51, *et seq.* He also sued the owner and operator of the cab, William Smith d/b/a Smitty's Cab Service, seeking damages from him under Louisiana state law.

The case was filed in a Louisiana state court and was ultimately tried there to a twelve-member jury. This jury returned a verdict in which it found that Mr. Tingstrom was not in the course and scope of his employment at the time of the accident and that the cab driver was not the Railroad's agent and therefore rejected his claims against the Railroad. The jury found William Smith, the cab driver, liable to Mr. Tingstrom and awarded him $40,000 in damages against Mr. Smith and his insurer. The trial judge entered a judgment accordingly.

On appeal, a three-judge panel of the Louisiana First Circuit Court of Appeal, affirmed the trial court judgment in a unanimous memorandum decision, Appendix A-23. On plaintiff's application, the Louisiana Supreme Court granted a writ of review and remanded the case to the appeals court for "a full opinion," Appendix A-27. On remand, a five-judge panel of the Court of Appeal — in a 3-to-2 decision — reversed the Court's previous decision, overturned the jury's finding exon-

erating the Railroad of liability and awarded to Mr. Tingstrom over $1 million in damages against the Railroad. The award included medical expenses which Mr. Tingstrom could not recover from the Railroad because they had already been paid under a group medical policy funded by the Railroad. Appendix A-1. The Court also awarded pre-judgment interest on this award.

The Railroad applied for rehearing and pointed out to the Court of Appeal that its decision exceeded the scope of appellate review applicable in FELA cases and the scope of the Louisiana Supreme Court's mandate; and that in any event, pre-judgment interest is not recoverable in FELA cases. Appendix A-29. The Court declined to rehear the case, Appendix A-49. The Railroad then made two applications to the Louisiana Supreme Court, one for an order directing the Court of Appeal to stay within the parameters of the mandate by which it remanded the case, Appendix A-50; and an alternative application for a writ of review, to review the correctness of the appellate decision, Appendix A-59. The Court denied these applications. Appendix A-77 and A-78. Since this denial amounted to an implied adoption by the Supreme Court of the appellate decision, the Railroad then applied to the Supreme Court for a rehearing, pointing out that the decision violated federal appellate review standards applicable in FELA cases and relevant decisions of the U.S. Supreme Court and other federal courts interpreting the FELA, notably the rule against an award of pre-judgment interest. Appendix A-79.

The Court denied the rehearing application on February 25, 1994, Appendix A-92. The Railroad then petitioned the state Court of Appeal to correct its judgment by eliminating from it the clearly erroneous award of pre-judgment interest.

Appendix A-94. The Court denied that request for relief on March 2, 1994, by a telephone notice to counsel.

On March 1, 1994, the Railroad filed in this Honorable Court an application for a stay of execution of the judgment while it was preparing for a filing its application for a writ of certiorari, Appendix A-99. That Application was denied on March 2, 1994. With the present Application, the Railroad is re-urging its Motion for a Stay Order and is furnishing herewith a Supersedeas Bond in the amount of $1,550,000, Appendix A-112.

REASONS FOR GRANTING THE WRIT

We must stress at the outset that this is not a states' rights case: Petitioner does not seek a ruling which would in any way affect the power, right or authority reserved to the States under the United States Constitution. Quite to the contrary, this is a case of clear defiance by a state court of the Supremacy Clause contained in Article VI of the United States Constitution, which provides that the judges in every state *"shall be bound"* by the Constitution, laws and treaties of the United States.

This Court in *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 245, 63 S.Ct. 246, 87 L.Ed. 239 (1942) stated, and later in *Felder v. Casey*, 487 U.S. 131, 151, 108 S.Ct. 2302, 101 L.Ed.2d 123 (1988) reiterated, that this Constitutional provision imposes on state courts a *"constitutional duty* to proceed in such manner that *all* the substantial rights of the parties under controlling federal law [are] protected." [Emphasis added.]

In *Felder,* this Court formulated, what has since been dubbed the "reverse Erie doctrine," as follows:

> "Just as federal courts are constitutionally obligated to apply state law to state claims, see *Erie* supra, 304 U.S., at 78-79, 58 S.Ct., at 822-823, so too the Supremacy Clause imposes on state courts a constitutional duty 'to proceed in such manner that all the substantial rights of the parties under controlling federal law [are] protected.' " [Citing *Garrett,* supra.]

This case involves a claim of a railroad employee against his railroad employer which is governed by the Federal Employers' Liability Act (FELA), 45 U.S.C. §51, *et seq.* In decision after decision, this Court has held that federal court interpretations of the FELA are binding on state courts in their administration of the Act. *American Iron & Steel Manufacturing Company v. Seaboard Air Line Railway,* 233 U.S. 261, 34 S.Ct. 502, 58 L.Ed. 949 (1914); *Urie v. Thompson,* 337 U.S. 163, 69 S.Ct. 1018, 93 L.Ed. 1282 (1949); *Dice v. Akron, Canton & Youngstown R. Co.,* 342 U.S. 359, 72 S.Ct. 312, 96 L.Ed. 398 (1952); and *South Buffalo Ry. Co. v. Ahern,* 344 U.S. 367, 73 S.Ct. 340, 97 L.Ed. 395 (1953).

In *Dice,* this Court stated that ". . . only if federal law controls can the federal Act be given that uniform application throughout the country essential to effectuate its purposes."

And in a concurring opinion in *Dice,* Justice Frankfurter put it this way:

> "If the States afford courts for enforcing the Federal Act, they must enforce the substance of the right given by Congress. They cannot depreciate the legislative currency issued by Congress—either expressly or by local methods of enforcement that accomplish the same result."

In *South Buffalo*, this Court again held that the FELA is intended to supersede all state laws relating to liability of a railroad for injury to its employees and that the Act must be construed uniformly throughout the United States. In sum, federal law controls all substantive matters involved in this suit and *preempts state law.*

Here, the state courts have disregarded controlling federal law in several respects. First, they erroneously concluded that the status of a railroad employee who was injured on his way to work, is no longer subject to a jury determination. In so holding, they have confused accommodation cases, such as *Empey* and *Carney*[1], (in which railroad workers have been held entitled to pursue FELA actions under the safe-place-to-work doctrine), with commuter cases, such as *Metropolitan* and *Getty*[2], which hold uniformly that railroad employees do not have the right to sue their employer under the FELA for injuries sustained while traveling to or from work.

The state courts have further ignored this Court's decision in *Shenker v. Baltimore & Ohio R. Co.*, 374 U.S. 1, 83 S.Ct. 167, 10 L.Ed. 709 (1963) and *Sinkler v. Missouri Pacific R. Co.*, 356 U.S. 326, 78 S.Ct. 758, 2 L.Ed. 799 (1958) — which leave the determination of FELA status largely to the juries — and this Court's decisions in *Tennant v. Peoria & P. U. Ry. Co.*, 121 U.S. 802, 64 S.Ct. 409, 88 L.Ed. 520 (1944) and *Lavender v. Kern, et al,* 327 U.S. 645, 652, 66 S.Ct. 740, 744, 90 L.Ed. 916, which prohibit reviewing courts in FELA cases to substi-

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[1] *Empey v. Grand Trunk Western R. Co.*, 869 F.2d 293 (6th Cir. 1989); *Carney v. Pittsburgh and Lake Erie Railroad Co.*, 316 F.2d 277 (3rd Cir. 1963), cert. denied, 375 U.S. 814, 84 S.Ct. 45, 11 L.Ed.2d 49 (1963).

[2] *Metropolitan Coal Co. v. Johnson*, C.A. Mass.1959, 265 F.2d 173; *Getty v. Boston and Maine Corporation*, 505 F.2d 1226 (U.S. 1st Cir. Ct. of App. 1974).

tute their evaluation of the evidence for that of a jury.

In *Tennant,* this Court held that reviewing courts in FELA cases "are not free to re-weigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more equitable."

And in *Lavender v. Kern, et al,* 327 U.S. 645, 652, 66 S.Ct. 740, 744, 90 L.Ed. 916 (1946), the Court reiterated this principle by stating:

> ". . . The jury having made that inference, the respondents were not free to relitigate the factual dispute in a reviewing court. Under these circumstances, it would be an undue invasion of the jury's historic function for an appellate court to weigh the conflicting evidence, judge the credibility of witnesses and arrive at a conclusion opposite from the one reached by the jury [citations omitted].
>
> . . . .
>
> It is no answer to say that the jury's verdict involved speculation and conjecture.
>
> . . . .
>
> Only when there is a complete absence of probative facts to support the conclusion reached, does a reversible error appear."

The state courts here further erred in ignoring the federal standards of appellate review — by which they acknowledged they were bound — under which federal appellate judges are precluded from exercising fact-finding functions, this being the sole prerogative of the jury. This includes the determination of the amount of damages which may be recoverable by

an FELA plaintiff. That this is a question governed by federal law cannot be disputed.

In *Norfolk and Western Railway Co. v. Liepelt*, 444 U.S. 490, 100 S.Ct. 755, 62 L.Ed.2d 689 (1980), this Court held:

> "It has long been settled that questions concerning the measure of damages in an FELA action are federal in character. *See, e.g., Michigan Central R. Co. v. Vreeland*, 227 U.S. 59, 33 S.Ct. 192, 57 L.Ed. 417 (1913). This is true even if the action is brought in State Court. *See, e.g., Chesapeake & Ohio R. Co. v. Kelly*, 241 U.S. 485, 491, 36 S.Ct. 630, 632, 60 L.Ed. 1117 (1916)."

In a footnote to this holding (footnote no. 5, 100 S.Ct. at p. 757), the Court stated:

> "One of the purposes of the Federal Employers' Liability Act was to 'create uniformity throughout the union' with respect to railroads' financial responsibility for injuries to their employees. *H. R. Rep.* No. 1386, 60th Cong., 1st Sess., 3 (1908). *See also, Dice v. Akron C. & Y. R. Co.*, 32 U.S. 359, 362, 72 S.Ct. 312, 314, 96 L.Ed. 398 (1952); *Brady v. Southern R. Co.*, 320 U.S. 476, 479, 64 S.Ct. 232, 234, 88 L.Ed. 239 (1943); *Hill, Substance and Procedure in State FELA Actions—The Converse of the Erie Problems?*, 17 Ohio St. L. J. 384 (1956).

Therefore, once they have decided that damages were due, the state appellate judges were bound under federal law to remand the case to the trier of fact for the determination of the amount of such damages. This they did not do. Instead, acting as fact finders, they awarded these damages themselves, compounding their error by including in their award medical expenses not recoverable under controlling federal decisions and adding pre-judgment interest in the face of a recent deci-

sion of this Court, prohibiting such an award. It is appropriate to note that the jury obviously saw Mr. Tingstrom's injuries and damages entirely differently from the appellate judges, for it awarded to Mr. Tingstrom only $40,000 against the taxi driver under state law, under which the measure of damages is at least as generous as that under the FELA.

In awarding interest from the date of "judicial demand" (i.e., the date on which the suit was filed, March 6, 1989), rather than from date of their judgment (October 15, 1993), the state judges acted in blatant disregard of this Court's decision in *Monessen Southwestern Railway Co. v. Morgan*, 486 U.S. 330, 108 S.Ct. 1837, 100 L.Ed.2d 389 (1988).

In *Monessen*, a Pennsylvania state court had assessed pre-judgment interest pursuant to state law in an FELA action. This Court, in a unanimous decision, held that the Pennsylvania state courts:

> ". . . erred in treating the availability of pre-judgment interest in FELA actions as a matter of state law rather than federal law [p. 335].
>
> . . . .
>
> The federal and state courts have held with virtual unanimity of over more than seven decades that pre-judgment interest is not available under the FELA [p. 338].
>
> . . . .

> Yet Congress has never attempted to amend the FELA to provide for pre-judgment interest. We are unwilling in the face of such congressional inaction to alter the long-standing apportionment between carrier and worker of the costs of railroad injuries. If pre-judgment interest is to be available under the FELA, the Congress must expressly so provide [p. 339]."

The Louisiana appellate court and Supreme Court, in passing, without any briefing, without any discussion, took it upon themselves to ignore the authority of this Honorable Court, amend the FELA, and award nearly $500,000 in pre-judgment interest against the applicant Railroad, which in the first instance, after a full trial before a 12-member jury, was found by the jury not to be liable to plaintiff *at all!* Despite petitioner's repeated requests, addressed both to the Louisiana appellate court and the Louisiana Supreme Court, these Courts refused to correct this error. If this Court takes no other action in this case, it should, under its Rule 10.1(c) reverse this award of pre-judgment interest and direct the state courts to award interest only from the date on which the appellate court for the first time awarded a money judgment to Mr. Tingstrom against the Railroad, on October 15, 1993.[3]

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[3] *See e.g., Louisiana & Arkansas R. Co. v. Pratt*, 142 F.2d 847, 848 (5th Cir. 1944) ("At the time the Act was enacted, interest was not allowable on claims for personal injuries until the amount of damages had been judicially ascertained."), *cited with approval in, Monessen*, 486 U.S. at 335 n.3.

CONCLUSION

What has happened in this case is that the Louisiana appellate court and the Louisiana Supreme Court, ignored the reverse *Erie* doctrine and:

(1) usurped the jury's prerogative to decide whether Mr. Tingstrom could be deemed "at work" at the time of his injury or whether the taxi driver could be deemed the Railroad's agent under the facts of this case;

(2) usurped the jury's prerogative to evaluate and assess damages recoverable by Mr. Tingstrom under the FELA (if he was entitled to recover under the FELA); and

(3) effectively overruled a leading decision of this Court, *Monessen Southwestern Railway Co. v. Morgan,* 486 U.S. 330 108 S.Ct. 1837, 100 L.Ed.2d 389 (1988).

The errors committed by the state courts in this case affect not only FELA actions but also actions under the Jones Act which are subject to the same considerations as actions arising under FELA. It is, of course, well-settled law that pre-judgment interest is not recoverable in Jones actions any more than it is in FELA actions. *Theriot v. J. Ray McDermott & Co.,* 742 F.2d 877 (5th Cir. 1984); *Wyatt v. Penrod Drilling Co.,* 735 F.2d 951 (5th Cir. 1984); *Barrios v. Louisiana Construction Materials Co.,* 465 F.2d 1157 (5th Cir. 1972).

Between Baton Rouge and New Orleans, the Mississippi River forms the largest harbor in the world. Additionally, extensive maritime operations are conducted daily from many of Louisiana's coastal towns and villages in connection with the exploration for and mining of minerals from beneath the waters of the Gulf of Mexico and fishing activities. Therefore,

Louisiana is among the pre-eminent states in the field of FELA and Jones Act litigation, much of it conducted in state courts.

If the decision of which Applicant complains were allowed to stand, it would be an invitation to Louisiana and other state courts to award pre-judgment interest in scores of FELA and Jones Act suits already pending and those which may be filed hereafter. This is not a result which, under Article VI of the U.S. Constitution, the Court should condone.

WHEREFORE, Applicant Missouri Pacific Railroad d/b/a Union Pacific Railroad prays that the requested Writ issue and that this Court summarily direct the Louisiana Supreme Court and the lower courts involved, to reinstate the verdict of the jury and dismiss plaintiff's suit against Applicant; alternatively, that this Court direct the Louisiana Supreme Court to remand the case to the trial court for trial of the issue of damages; alternatively, that this Court direct the Louisiana Supreme Court to eliminate from plaintiff's judgment any award for pre-judgment interest.

Applicant further prays that this Court issue a stay order so as to stay the execution of the judgment recovered by plaintiff Tingstrom until the issues raised by this Application have been passed on by this Honorable Court.

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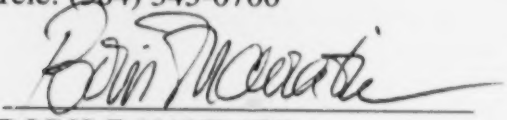

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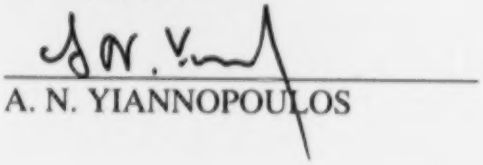

A. N. YIANNOPOULOS

APPENDICES

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APPENDIX A

STATE OF LOUISIANA

COURT OF APPEAL, FIRST CIRCUIT

Post Office Box 4408

Baton Rouge, Louisiana 70821-4408

Docket Number: 90/CA/2283R

[DATE: OCT 15 1993]

GRANT TINGSTROM, III

VERSUS

WILLIAM L. SMITH D/B/A SMITTY'S CAB SERVICE, ET AL

TO:

Russell A. Woodard
114 N. Trenton
Ruston, LA 71270

Boris F. Navratil
P.O. Box 3551
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Rebel G. Ryland
P.O. Box 1029
Columbia, LA 71418

Janice B. Unland
3445 N. Causeway, [Ste. 501]
Metairie, LA 70002

NOTICE OF JUDGMENT

You are hereby served with a copy of the opinion in the above entitled case.

Your attention is invited to Rule 2-18 (Rehearing) of the Uniform Rules of the Courts of Appeals, effective July 1, 1982.

I hereby certify that this opinion and notice of judgment were mailed to the trial judge, the clerk of the trial court, all appeal counsel of record, and all parties not represented by counsel this date.

STANLEY P. LEMOINE, CLERK
COURT OF APPEAL, FIRST CIRCUIT

AMENDED

TIME DELAY FOR REHEARING, C.C.P. ART. 2166; C.Cr.P. ART. 922; Act No. 451, EFFECTIVE AUGUST 30, 1983.

FEE FOR REHEARING, R.S. 13:352, AS AMENDED, EFFECTIVE AUGUST 30, 1986.

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 90 CA 2283R

GRANT TINGSTROM, III

VERSUS

WILLIAM L. SMITH d/b/a SMITTY'S CAB [SERVICE], COMCO INSURANCE COMPANY, MISSOURI PACIFIC RAILROAD COMPANY AND UNION PACIFIC RAILROAD COMPANY

ON APPEAL FROM THE EIGHTEENTH JUDICIAL DISTRICT COURT, NUMBER 21,537, IN AND FOR THE PARISH OF WEST BATON ROUGE, LOUISIANA, HONORABLE EDWARD N. ENGOLIO, JUDGE PRESIDING.

BEFORE: LOTTINGER, C.J., FOIL, FOGG, PITCHER, AND PARRO, JJ.

LOTTINGER, CHIEF JUDGE. OCT 15 1993

This case was remanded by the Louisiana Supreme Court for a full opinion. *Tingstrom v. Smith,* 612 So.2d 38 (La. 1992). The original opinion of this court appears at 610 So.2d 1132. A remand for a full opinion does not limit the appellate

review authority of this court on remand, and thus after a careful reconsideration of our original opinion, we conclude that we erred in affirming the trial court judgment and now revisit this appeal.

FACTS

This suit for damages in tort was brought by Grant Tingstrom, III, an engineer for Missouri Pacific Railroad Company and Union Pacific Railroad Company (MOPAC). The material facts of this case are not in dispute. Tingstrom and three other MOPAC employees were operating a "spray train" which spayed the railroad tracks with chemicals in order to clear the tracks of plant growth. Tingstrom left Avondale, Louisiana, his home terminal, on March 7, 1989. The spray train discontinued operations for the day in Addis, Louisiana. Pursuant to an agreement between MOPAC and the railworkers union, MOPAC was to provide lodging and transportation whenever employees were required to stay overnight at a place other than their home terminal. MOPAC contracted with the Newcourt Inn in Addis to provide lodging and transportation to and from the rail yard. The Newcourt Inn then contracted with Smitty's Cab Service to provide transportation.

On March 8, 1989, the crew began and ended their day at the yard in Addis without incident. On March 9, 1989, en route to the Addis yard, the taxicab in which the crew was riding rear-ended a full-size van at a stoplight. Mr. Tingstrom, who was riding in the back seat behind the driver, suffered abrasions on his back and complained of stiffness in the lower back area. As a result of those injuries Mr. Tingstrom has undergone two separate operations on his back, and is to date unable to perform his previous job duties due to his physical condition.

Mr. Tingstrom brought suit against William L. Smith, the driver of the taxicab, Smitty's Cab Service, the owner of the taxicab, and MOPAC. The claims against the driver and owner of the taxicab are based on negligence. The suit against MOPAC is based on the Federal Employers' Liability Act (FELA), Title 45, U.S.C.A. sec. 51, which provides in pertinent part:

> Every common carrier by railroad while engaging in commerce between any of the several States or Territories...shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce...for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier. . .

The jury returned a verdict in favor of the plaintiff in an amount of $40,000.00 against William L. Smith and Smitty's Cab Service. The compensation was for past pain and suffering only and was reduced by 50% based on the comparative negligence of the plaintiff. The jury found that MOPAC was not liable for the plaintiff's injuries because Mr. Tingstrom was not in the course and scope of his employment at the time of the accident. The trial judge granted the plaintiff's motion for JNOV with respect to the issue of comparative negligence.

ASSIGNMENTS OF ERROR

The plaintiff presents the following "Specifications of Errors and Issues Presented for Review:"

I. The jury verdict was clearly wrong and not supported by a preponderance of the evidence.

A. Missouri-Pacific should have been found liable for Tingstrom's injuries.

1. Tingstrom should have been found to be within the course and scope of his employment with Missouri-Pacific.

2. William Smith d/b/a Smitty's Cab Service should have been found to be an agent or employee of the railroad.

3. The railroad should have been found liable for the defective nature of Smith's cab.

B. The jury erred in failing to award Tingstrom:

1. Adequate damages for past pain and suffering

2. Any damages for future pain and suffering

3. Any past or future medical expense and,

4. Any past or future loss of income.

II. The Court erred and the Plaintiff was unduly prejudiced by:

A. The Court allowing the testimony of Dr. Allen Joseph who was not listed on the pre-trial.

B. The Court allowing Pat Crabtree to talk about jobs that Tingstrom could allegedly do.

C. The Court allowing defense counsel to give testimony in argument which testimony was totally unsupported by and contradicted by actual evidence.

D. Failing to give Plaintiff's Requested Instructions No. 25 and 29.

E. Giving Missouri-Pacific Instruction No. 15.

DISCUSSION

Initially we must determine what scope of review is to be applied, federal or state. In a recent decision of this court, *Dufour v. Union Pacific Railroad Company*, 610 So.2d 843 (La. App. 1st Cir. 1992), *writ denied*, 614 So.2d 1263 (La. 1993), it was held that with respect to actions brought under the FELA, federal standards of review are to be applied by the reviewing state court. See also *Trahan v. Gulf Crews, Inc.*, 260 La. 29, 255 So.2d 63, 66-67 (1971) and *Bailey v. Missouri Pacific Railroad Co.*, 383 So.2d 397, 401 (La. App. 3rd Cir.), *writ denied*, 385 So.2d 784 (La. 1980). The standard of review for factual determinations in FELA cases has been articulated as follows: "[o]nly when there is a complete absence of probative facts to support the conclusion reached by the jury does reversible error occur." *Dennis v. Denver & Rio Grande Western Railroad Co.*, 375 U.S. 208, 84 S.Ct. 291, 11 L.Ed.2d 256 (1963). With respect to the trial court's legal conclusions we review the issues de novo.

In order for a plaintiff to prevail on a FELA claim he must establish the following: 1) that the injury complained of occurred while the plaintiff was in the course and scope [of his] employment 2) that the injury occurred as a result of negligence 3) that the negligence was perpetrated by the employer or an agent of the employer and, 4) the extent of damage done to the plaintiff.

I.

We address first the question of whether or not the plaintiff was in the course and scope of his employment at the time of the injury. In an early decision of the United States Supreme Court, *Erie Railroad Company v. Winfield,* 244 U.S. 170, 37 S.Ct. 556, 61 L.Ed. 1057 (1917), it was held that a rail worker killed crossing the tracks after his shift ended was in the course of his employment with the railroad, as the crossing was a "necessary incident of his day's work." The wife of the deceased worker was therefore allowed to maintain the action under the FELA statute. It is the plaintiff's position that the transportation between the yard in Addis and the Newcourt Inn was a necessary incident to the plaintiff's work day.

MOPAC, on the other hand, argues that the controlling cases are "commuter cases" in which the courts have typically held that an employee commuting to and from the work site from his home, using the employer's trains as a means of transportation, is not within the course and scope of employment. In these cases the determinative issue has been that the employers had freedom of choice as to what mode of transportation they would use to get to and from work. *See Young v. New York, N.H. & H.R. Co.,* 74 F.2d 251 (2d Cir. 9134), which held that an employee injured while commuting was not in the course and scope of employment, viewing as dispositive the fact that the employee had a choice of route. *Sassman v. Pennsylvania R.Co.,* 144 F.2d 950 (3rd Cir. 1944), which found that absent employer compulsion as to the mode of travel to and from work no recovery is available under FELA. *Metropolitan Coal Company v. Johnson,* 265 F.2d 173, 178 (1st Cir. 1959), where the court found that an employee injured on the employer's train while commuting was not within the course

and scope of his employment as, "[h]e was not required to go to work on the defendant's passenger train" and the defendant's train was only one of several means of transportation the plaintiff may have chosen, and *Getty v. Boston and Maine Corporation*, 505 F.2d 1226, 1228 (1st Cir. 1974), which found that, "absent circumstance indicating a special arrangement with one's employer, subjective conditions resulting from employee choices of where to live and how to travel are insufficiently related to employment to determine coverage of the federal statute." Given the obvious distinctions between the present case and the commuter cases, to wit, that the plaintiff was not traveling from his home to his place of work, but from his place of work to employer provided lodging, and that the plaintiff did not exercise any choice as to the means of transport, we find these cases inapposite.

The plaintiff points our attention to *Leek v. Baltimore & Ohio Railroad Company*, 200 F.Supp. 368 (N.D. W.V. 1962), which held that employees who were injured while being transported by cab, pursuant to an agreement between the cab company and the railroad, from their work site to the rail yard where they were to sign-off for the day were in the course and scope of their employment. MOPAC would have us distinguish this case from the present case as in *Leek* the plaintiff had not officially ended the workday at the time of the accident, whereas in the present case, the plaintiff had not begun his workday at the time of the accident. Given the reasoning behind the holding of the following cases we find this distinction to be artificial.

In *Empey v. Grand Trunk Western Railroad Co.*, 869 F.2d 293 (6th Cir. 1989), a railroad employer contracted with a private motor lodge to provide railroad employees lodging during

layovers. While at the lodge the employee slipped on the floor of the bathroom which was wet due to a defective latch on the shower door. The appellate court held, "an employee who is injured while he avails himself of housing which his employer has provided and implicitly encouraged him to use is within the scope of his employment for the purposes of the FELA." *Id.* at 295. The court agreed with the trial court's holding that **as a matter of law** the employee was within the course and scope of his employment. *See also Carney v. Pittsburgh & Lake Erie Railroad Company,* 316 F.2d 277 (3rd Cir.), *cert. denied,* 375 U.S. 814, 84 S.Ct. 45, 11 L.Ed.2d 49 (1963), which held that a railroad employee was within the course and scope of his employment while staying overnight at a YMCA. In the present case it is undisputed that the MOPAC implicitly encouraged its' [its] employees to use Smitty's Cab Service for transportation. There is no evidence presented to the effect that the railroad would have reimbursed the plaintiff if he had sought other means of transportation to the hotel. We see no reason to distinguish between the overnight stay itself and the employer provided ride to and from the lodging.

We therefore find that as a matter of law the plaintiff was within the course and scope of his employment with MOPAC at the time of his injuries. The cab ride from the hotel to the Addis yard was a necessary incident to his day's work. The plaintiff had no control over the means of transportation as all arrangements were made by MOPAC. Facts adduced at trial which reinforce this conclusion include the following: MOPAC required specific insurance limits for cabs providing services to its' [its] employees, MOPAC representatives inspected the cab and, MOPAC required the cab driver to display a MOPAC sign in the cab delineating company rules.

MOPAC implicitly encouraged its' [its] employees to use Smitty's Cab Service. This issue was improperly submitted to the jury as there was no evidence submitted by MOPAC from which the jury could have concluded that the plaintiff was not within the course and scope of his employment at the time of the accident.

II.

We next turn to the issue of whether or not the negligence of Smitty's Cab Company, which is not in dispute, can be imputed to MOPAC based on FELA agency theory. The United States Supreme Court addressed this issue, as well as the general purpose of FELA, in *Sinkler v. Missouri Pacific Railroad Company*, 356 U.S. 326, 78 S.Ct. 75, 2 L.Ed.2d 799 (1958). In *Sinkler,* a MOPAC employee was injured due to the negligence of a switching crew. The switching crew was not employed by MOPAC, yet the court found that the crew was an "agent" of MOPAC for FELA purposes and its' [its] negligence was imputed to MOPAC. The court noted that FELA was a departure from the common law and was a "response to the needs of railroad workers who are daily exposed to the risks inherent in railroad work and are helpless to provide adequately for their own safety." 356 U.S. at 329, 78 S.Ct. at 762. The holding of the court was that when an employee is injured as a result of the negligence of others performing "operational activities" of the railroad, such others are "agents" of the employer within the meaning of FELA.

In *Leek v. Baltimore & Ohio Railroad Company,* 200 F.Supp. at 370-371, the court found that one of the characteristics of the railroad business is transporting employees from one point to another. That court found the negligence of the

cab driver imputable to the railroad under FELA agency theory. The court dealt with the issue of operational activities as follows:

> Certainly, there must be many services performed by others under contract with a railroad, which are incidental or even necessary to the corporate purposes of the railroad, which are not "operational activities" within the meaning of those words as employed in the Sinkler case. Just where the line should be drawn, I am neither prepared nor called upon to specify. However, I do not believe that the line should be drawn short of the activities which the taxicab company was performing for the railroad in this case. 200 F.Supp. at 370.

The Jones Act specifically incorporates the standards of FELA with respect to an employer's liability for the acts of agents. In *Hopson v. Texaco*, 383 U.S. 262, 86 S.Ct. 765, 15 L.Ed. 740 (1966), the court found that the negligence of a cab driver hired by a shipowner to transport two sick seamen to the U.S. Consulate in Trinidad was imputable to the shipowner under FELA agency theory. The court found that the transportation of the seamen was a vital part of the ship's total operations.

Finally, the courts in both *Carney v. Pittsburgh & Lake Erie Railroad Company*, 316 F.2d at 281-282 and *Empey v. Grand Trunk Western Railroad Co.*, 869 F.2d at 296-297 held that the parties providing lodging for the railroads were performing operational activities of the railroad, thus their negligence was imputable to the railroad.

We therefore hold that FELA is applicable to the plaintiff's claims. He was engaged in the course and scope of his

employment with the railroad while being transported by cab to the work site. The negligence of the cab driver is imputable to MOPAC as the cab driver was performing operational activities of the railroad at the time of the accident. MOPAC's arguments to the effect that it should not be held liable as Newcourt Inn chose the cab company are unpersuasive. MOPAC cannot insulate itself from liability by simply contracting with a third party.

III.

Plaintiff further contends that the jury should have found MOPAC liable for the defective nature of the cab. That is, the plaintiff testified that the door of the cab was missing its interior panel and that the broken door handle caused the abrasions on his back. Given the fact that the jury verdict did not distinguish between the cab driver's negligent operation of the vehicle and the negligent maintenance of the vehicle we are unable to rule on this matter. As MOPAC is liable for the acts of Smitty's Cab Company under the aforementioned agency theory, the precise acts of negligence are irrelevant.

IV.

As stated above the standard of review with respect to the jury's damage award to the plaintiff is whether there is a complete absence of probative facts to support the conclusion reached by the jury. The jury awarded the plaintiff $40,000.00 for past pain and suffering, but refused to award the plaintiff any damages for future pain and suffering, past medical expenses, future medical expenses, or past or future loss of income.

With respect to past and future medical expenses the plaintiff established that the two operations conducted prior to trial cost $42,931.46. The plaintiff also produced evidence that an additional operation would be required at a cost of $25,000.00. The defense produced no evidence to the effect that the surgeries were unnecessary or that the expenses incurred by the plaintiff were inaccurate. The only evidence put on by the defense with respect to past and future medical expenses was the testimony of a doctor who examined the plaintiff's medical records and testified that the plaintiff had a congenital predisposition to the type of back injury from which he currently suffers. The fact that the plaintiff may have been predisposed to a back injury is immaterial to the determination of liability. The defendant takes the plaintiff as he finds him. We therefore conclude that there was a complete absence of probative facts from which the jury could conclude that the plaintiff's past and future medical expenses were unrecoverable, and accordingly, we award the plaintiff $67,931.46.

With respect to past and future lost wages, we find that there were no probative facts introduced by the defense from which the jury could have concluded that no award was due to the plaintiff. The plaintiff established through documentary evidence and testimony that his past lost wages were $68,892.00. The plaintiff also established, through the testimony of an economist, that his future earning capacity had been reduced by $725,441.00. Based on the variables utilized by the economist, we feel $600,000.00 represents a more accurate and reasonable estimation of the plaintiff's actual loss of future earning capacity.

With respect to past, present and future pain and suffering, it is the opinion of the court that an award of $40,000.00 was

unsupported by probative facts. On July 13, 1988, a percutaneous automated discectomy was performed on the plaintiff. The plaintiff was released from the hospital on July 15, 1988. This operation did not alleviate the plaintiff's pain. According to the plaintiff's medical records, a second doctor performed fusions of the plaintiff's discs on June 21, 1989. The plaintiff was released from the hospital on June 28, 1989. According to the plaintiff's doctor, at the time of the second operation the plaintiff had as severe of back muscle spasms as one can have, making his back as hard as wood. The plaintiff is unable to bend his back. He must wear a back brace at all times to hold the back stable until the fusions become solid. The plaintiff's doctor testified that another operation may be required, and even then the plaintiff will have a fragile back and possibly permanent nerve damage. The defense introduced no evidence rebutting the plaintiff's claims of pain and suffering. Instead, the defense relied on it's [its] unsubstantiated contention that the plaintiff was a dishonest malingerer. This contention was not supported by any probative facts in the record. As such, we award the plaintiff a total of $300,000.00 in past, present and future pain and suffering.

V.

Plaintiff claims that the trial judge erred in allowing the defense witness, Dr. Allen Joseph, to testify as he was not listed in the pre-trial order. La. Code Civ. Pro. art. 1551 states, in pertinent part, that the pre-trial order may be modified by the trial judge "at the trial to prevent manifest injustice." As Dr. Joseph was MOPAC's only witness and was substituted for the Doctor listed on the pre-trial order, we find that the trial judge's modification of the order was appropriate.

Further, the plaintiff contends that the trial judge erred in allowing Pat Crabtree, MOPAC's Louisiana Supervisor, to discuss what other jobs the plaintiff could perform in his current condition. This testimony is clearly relevant under La. Evid. Code art. 401 as it has the tendency to make a fact of consequence, the future earning potential of the plaintiff, more or less probable. The witness also clearly has personal knowledge of the types of jobs available with his employer, thus satisfying La. Evid. Code art. 601 and 602. If the plaintiff wished to test the availability of these types of jobs it was a proper topic for cross-examination.

The plaintiff also argues that the trial court erred in allowing the counsel for MOPAC to give testimony in argument which was unsupported and contradicted by evidence. While not finding that MOPAC's counsel misrepresented evidence in argument to the jury, if that were the case, the plaintiff, under La. Code Civ. Pro. art. 1632, is entitled to point out such errors to the jury in the rebuttal portion of his closing argument.

In as much as we have previously discussed the trial court's error in submitting instructions to the jury as to the FELA, we need not address the adequacy of the instructions.

Therefore, for the above and foregoing reasons, the judgment of the trial court to the extent that it found liability on the part of William L. Smith and Smitty's Cab Service is affirmed, to the extent that it found no liability on the part of Missouri Pacific Railroad Company and Union Pacific Railroad Company is reversed, and to the extent of the damages awarded, the judgment is amended. There is now judgment in favor of plaintiff, Grant Tingstrom, III and against William L. Smith, Comco Insurance Company and Missouri Pacific Railroad

Company and Union Pacific Railroad Company, in solido, in the sum of $1,036,823.46, together with judicial interest from the date of judicial demand, until paid, and for all costs of this proceeding. However, as to Comco Insurance Company, this judgment is limited to the sum of $25,000.00, the limit of its applicable liability insurance coverage, together with interest payable pursuant to the provisions of its insurance contract.

AFFIRMED IN PART, REVERSED IN PART, AMENDED AND RENDERED.

GRANT TINGSTROM, III/STATE OF LOUISIANA

/COURT OF APPEAL

VERSUS **/FIRST CIRCUIT**

/CA 92 2283R

WILLIAM L. SMITH d/b/a
SMITTY'S CAB SERVICE,
COMCO INSURANCE COMPANY,
MISSOURI PACIFIC RAILROAD COMPANY
AND UNION PACIFIC RAILROAD COMPANY

ON APPEAL FROM THE EIGHTEENTH JUDICIAL DISTRICT COURT, PARISH OF WEST BATON ROUGE, NO. 21,537, HONORABLE EDWARD N. ENGOLIO, JUDGE PRESIDING.

FOIL, JUDGE, Dissenting.

I respectfully dissent.

This case is on remand from the Louisiana Supreme Court. Originally, another panel of this court affirmed the trial court's ruling. Tingstrom v. Smith, 610 So.2d 1132 (La. App. 1st Cir. 1992).

The initial opinion of this court was a one page opinion, which concluded as follows:

After a thorough review and evaluation of the record, we are convinced the judgment rendered by the trial court was correct.

Thereafter, no party applied for a rehearing in this court, but an application for writs was applied for in the Louisiana Supreme Court. The action of the Supreme Court was as follows:

Granted and remanded to the Court of Appeal, 1st Circuit, for a full opinion.

When this court handed down its opinion and the time for application for rehearing had expired, the decision of this court was final. Only the Supreme Court could then reverse or modify the judgment. The Supreme Court has not done so. It merely remanded the case to us for a full opinion. It apparently wanted a full explanation as to why we affirmed the trial court. And I feel that is all we are authorized to do at this stage of the proceedings.

I feel that this court is without authority to completely change the outcome of the case, as the majority does here. If there is to be any change in the case, only the Supreme Court has the authority to do so at this time.

For the foregoing reasons, I respectfully dissent.

APPENDIX B

18TH JUDICIAL DISTRICT COURT

PARISH OF WEST BATON ROUGE

STATE OF LOUISIANA

NUMBER 21,537

GRANT TINGSTROM, III

VERSUS

WILLIAM L. SMITH, ET AL

JUDGMENT AFTER JURY VERDICT

This suit came on to be tried before the Court and a jury, Honorable Edward N. Engolio, Judge presiding, and having been duly tried, and the jury having been duly instructed on the law and asked to return special verdicts, and the jury having returned such verdicts finding that:

1. No negligence on the part of Missouri Pacific Railroad caused damage to plaintiff, Grant E. Tingstrom, III;

2. Negligence on the part of William L. Smith's caused damages to Grant E. Tingstrom, III, to the extent of fifty percent, and that Grant E. Tingstrom, III, himself was liable to the extent of fifty percent for his own damages; and

3. That the damages suffered by Grant E. Tingstrom, III amounted to $40,000;

and the Court having accepted the jury verdicts;

IT IS ORDERED, ADJUDGED AND DECREED that plaintiff's suit against Missouri Pacific Railroad Company be and it is hereby dismissed with prejudice. Costs attributable to plaintiff's suit against the Company are assessed to the *plaintiff.* IT IS FURTHER ORDERED AND DECREED that plaintiff, Grant E. Tingstrom, III, recover judgment in the amount of TWENTY THOUSAND AND NO/100 ($20,000) DOLLARS, against William L. Smith, and COMCO Insurance Company, in solido, together with judicial interest thereon from date of judicial demand, until paid, and all costs attributable to plaintiff's suit against said defendant.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the expert witness fees of the following witnesses be set as hereinafter shown and taxed as court costs in this matter:

Dr. James D. Crittenden (deposition fee)	**$225.00**
Dr. Victor T. Bazzone (deposition fee)	**$250.00**
Dr. John D. Jackson	**$500.00**
Dr. Allen Joseph	**$350.00**
Dr. Randolph Rice	**$250.00**
Stephanie Chalfin	**$150.00**

JUDGMENT READ, RENDERED AND SIGNED, at *Port Allen,* Louisiana this 30th day of April, 1990.

s / Edward N. Engolio
Edward N. Engolio, Judge
18th Judicial District Court

CERTIFICATE

I certify that a copy of the foregoing formal Judgment, prepared by the undersigned, has been furnished to and discussed with Rebel G. Ryland, Esq., counsel for plaintiff and Gregory Porobil, Esq., counsel for defendants, William L. Smith and Comco Insurance Company, and has been approved by them as to form.

Baton Rouge, Louisiana, this 26th day of April, 1990.

s / Gayla M. Moncla for Boris F. Navratil

Boris F. Navratil

APPENDIX C

STATE OF LOUISIANA

COURT OF APPEAL, FIRST CIRCUIT

Post Office Box 4408

Baton Rouge, Louisiana 70821-4408

Docket Number: 90/CA/2283

[DATE: OCT 16 1992]

GRANT TINGSTROM, III

VERSUS

WILLIAM L. SMITH D/B/A SMITTY'S CAB SERVICE, ET AL

TO:

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NOTICE OF JUDGMENT

You are hereby served with a copy of the opinion in the above entitled case.

Your attention is invited to Rule 2-18 (Rehearing) of the Uniform Rules of the Courts of Appeals, effective July 1, 1982.

I hereby certify that this opinion and notice of judgment were mailed to the trial judge, the clerk of the trial court, all appeal counsel of record, and all parties not represented by counsel this date.

s / Karen West
STANLEY P. LEMOINE, CLERK
COURT OF APPEAL, FIRST CIRCUIT

AMENDED

TIME DELAY FOR REHEARING, C.C.P. ART. 2166; C.Cr.P. ART. 922; Act No. 451, EFFECTIVE AUGUST 30, 1983.

FEE FOR REHEARING, R.S. 13:352, AS AMENDED, EFFECTIVE AUGUST 30, 1986.

NOT DESIGNATED FOR PUBLICATION

GRANT TINGSTROM, III	**NO. CA 90 2283**
VERSUS	**COURT OF APPEAL**
WILLIAM L. SMITH d/b/a SMITTY'S CAB SERVICE, COMCO INSURANCE COMPANY, MISSOURI PACIFIC RAILROAD COMPANY AND UNION PACIFIC RAILROAD COMPANY	**FIRST CIRCUIT**
	STATE OF [LA]

OCT 16 1992

ON APPEAL FROM THE EIGHTEENTH JUDICIAL DISTRICT COURT IN AND FOR THE PARISH OF WEST BATON ROUGE, STATE OF LOUISIANA, NO 21,537, DIVISION "C", HONORABLE EDWARD N. ENGOLIO, JUDGE PRESIDING.

BEFORE: LOTTINGER, C.J., FOIL AND COVINGTON[1] JJ. COVINGTON, J.

This action is a suit for damages in tort arising from an automobile accident between a taxi cab in which plaintiff was riding as a passenger and another vehicle. Grant Tingstrom, the plaintiff, filed suit against the taxi driver, William L. Smith, Smith's liability insurer, Comco Insurance Company

[1] Judge Grover L. Covington, retired, is serving as judge *pro tempore* by special appointment of the Louisiana Supreme Court.

(Comco) and his employer, Missouri Pacific Railroad Company. Upon plaintiff's motion for judgment notwithstanding the verdict, the trial judge nullified the jury's finding that plaintiff's own negligence contributed 50% to his injuries and affirmed the jury's finding that (1) plaintiff's injuries were due to the negligence of the taxi driver, (2) plaintiff was entitled to an award of $40,000 in general damages, (3) plaintiff was not in the course of his employment at the time of the accident and (4) the taxi driver was not the Railroad's agent for FELA purposes.

After a thorough review and evaluation of the record, we are convinced the judgment rendered by the trial court was correct. **Lirrette v. State Farm Insurance Company,** 563 So. 2d 850 (La. 1990). The appellants are cast for the costs of this appeal.

AFFIRMED.

APPENDIX D

THE SUPREME COURT OF THE

STATE OF LOUISIANA

GRANT TINGSTROM, III

VS. NO. 92-C - 2976

WILLIAM L. SMITH d/b/a
SMITTY'S CAB SERVICE, COMCO
INSURANCE COMPANY, MISSOURI
PACIFIC RAILROAD COMPANY and
UNION PACIFIC RAILROAD

IN RE: Tingstrom, Grant, III; - Plaintiff(s); Applying for Writ of Certiorari and/or Review; to the Court of Appeal, First Circuit, Number CA90 2283; Parish of West Baton Rouge Eighteenth Judicial District Court Div. "C" Number 21537

December 21, 1992

Granted and remanded to the Court of Appeal, 1st Circuit, for a full opinion.

JCW

PFC

WFM

JLD

HTL

PH

Supreme Court of Louisiana
December 21, 1992

s/Frans J. Labranche, Jr.
Clerk of Court
For the Court

APPENDIX E

GRANT TINGSTROM, III	: STATE OF LA
VERSUS	: COURT OF APPEAL
WILLIAM L. SMITH D/B/A SMITTY'S CAB SERVICE, ET AL	: FIRST CIRCUIT
	: NO. 90/CA/2283R

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APPLICATION FOR A REHEARING EN BANC, ALTERNATIVELY FOR A REGULAR REHEARING, ON BEHALF OF DEFENDANT/APPELLEE, MISSOURI PACIFIC RAILROAD COMPANY D/B/A UNION PACIFIC RAILROAD COMPANY

Appellee, Missouri Pacific Railroad Company d/b/a Union Pacific Railroad Company, hereby applies for a rehearing, so as to have this Court reconsider the following issues:

1. Whether this Court has jurisdiction to reverse its own decision handed down October 16, 1992, after the Louisiana Supreme Court granted a writ of review and remanded the case to this Court "for a full opinion."

2. Alternatively, whether under the federal standard of appellate review, this Court was justified in overruling the findings of the jury: (1) that plaintiff was not at work at the time of the accident which caused his alleged injuries; (2) that the driver of the taxi in which plaintiff was riding as a passenger, was not an agent of the Railroad for FELA purposes; (3)

that plaintiff's injuries entitled him to an award of $40,000.

3. Whether the Court erred in making an award to plaintiff for medical expenses, which have been paid under a comprehensive policy provided to plaintiff by the Railroad and decreeing that plaintiff could recover interest on the award made to him, from date of judicial demand, instead of the date of judgment.

The rehearing should be granted en banc for reasons discussed in the attached brief.

WHEREFORE, Appellee/Defendant, MISSOURI PACIFIC RAILROAD COMPANY, prays for an order setting this case for a rehearing en banc.

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s/Boris F. Navratil
BORIS F. NAVRATIL (#9909)

STATE OF LOUISIANA

COURT OF APPEAL, FIRST CIRCUIT

DOCKET NO.: 90/CA/2283R

* * *

GRANT TINGSTROM, III

VERSUS

WILLIAM L. SMITH D/B/A
SMITTY'S CAB SERVICE, ET AL

* * *

ON APPEAL FROM THE 18TH JUDICIAL DISTRICT COURT
PARISH OF WEST BATON ROUGE, LOUISIANA
NUMBER 21,537,
HONORABLE EDWARD N. ENGOLIO,
JUDGE PRESIDING

* * *

BRIEF IN SUPPORT OF THE APPLICATION OF DEFENDANT/APPELLEE, MISSOURI PACIFIC RAILROAD COMPANY, FOR A REHEARING

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MAY IT PLEASE THE COURT:

I.

WHY A REHEARING EN BANC SHOULD BE GRANTED.

The original decision of this Court, dated October 16, 1992, was handed down by a three-judge panel composed of the Honorable Morris A. Lottinger, Jr., Chief Judge, and Judges Grover L. Covington and Frank Foil. In that decision, the Court stated that "after a thorough review and evaluation of the record, we are convinced that the judgment rendered by the trial court was correct." This opinion was authored by Judge Covington, with no dissent from either the two other judges. Thus, unanimously, the Court approved the findings of the jury that: (1) plaintiff's injuries were due to the negligence of the taxi driver; (2) the plaintiff was entitled to an award of $40,000 in general damages for his injuries; (3) that at the time of the accident, plaintiff was not within the course and scope of his employment with the defendant Railroad; and (4) that the taxi driver was not the Railroad's agent for FELA purposes.

On plaintiff's application to the Louisiana Supreme Court for a writ of review, that Court handed down an order, stating:

> "Granted and remanded to the Court of Appeal, First Circuit, for a full opinion."

On remand, the case was taken up by a 5-judge panel composed of the Honorable Morris A. Lottinger, Chief Judge, and Judges Foil, Fogg, Pitcher and Parro. Then, in an opinion authored by Judge Lottinger, from which Judges Foil and

Parro dissented, the Court decided to "revisit this appeal" and proceeded to reverse the previous decision. In effect, the original decision, handed down by one three-judge panel, was reversed by another three-judge panel, with only one member common to both panels. If the original panel had undertaken the task of complying with the Supreme Court mandate, the result may well have been different. If Judge Parro had taken the position previously occupied by Judge Covington, the result *would have* been different. In light of this, we believe that the entire Court should now consider the issues, which — insofar as Louisiana jurisprudence is concerned — are issues of first impression. They are certainly weighty, considering that the defendant Railroad, which was exonerated of all liability to plaintiff by a 12-man jury, the trial judge, and the initial decision of this Court, is now held liable to plaintiff for over $1,000,000. Further, the question of whether this Court even had the authority to revise its previous ruling, is important enough to merit the attention of the full membership of this Court.

II.

DOES THIS COURT HAVE THE AUTHORITY TO REVERSE ITSELF?

Judge Foil, in his dissenting opinion — in which Judge Parro concurred — makes the following observation which appears to us to set forth the correct principles of appellate procedure and the finality of judgments:

> "When this Court handed down its opinion and the time for application for rehearing had expired, the decision of this Court was final. Only the Supreme Court could then reverse or modify the judgment. The Supreme Court has

> not done so. It merely remanded the case to us for a full opinion. It apparently wanted a full explanation as to why we affirmed the trial court. And I feel that is all we are authorized to do at this stage of the proceedings."

It seems clear that since the Supreme Court has granted a writ of review in this case, the case is now pending before it, and it alone can make a final adjudication after reviewing this Court's "full opinion," i.e. an opinion explaining more fully the reasons for the October 16, 1992 decision. There is no legal precedent — nor does the majority cite any authority for — the statement: "A remand for a full opinion does not limit the appellate review authority of this Court on remand . . . ." If this case is now pending before the Supreme Court — as we, along with Judges Foil and Parro, believe it is — this Court is without jurisdiction to re-adjudicate the appeal.

III.

ARE THE VERDICTS RETURNED BY THE JURY TOTALLY UNSUPPORTED BY THE EVIDENCE?

In its new opinion, this Court acknowledges that it is bound by the Federal standard of appellate review, that it must affirm the jury's findings of fact if there is *any* evidence in the record to support them. As stated by the U.S. Supreme Court in *Tennant v. Peoria and P.U. Ry. Co.*, 121 U.S. 802, 64 Sup. Ct. 610 (1944):

> "Courts are not free to re-weigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more equitable."

Stated obversely, this Court may not reverse a jury's find-

ings in this FELA case, unless there is a *complete absence* of any probative facts to support them. The question then is whether there was a *complete absence* of probative facts on the basis of which the jury could have concluded (1) that Mr. Tingstrom was *not* in the course and scope of his employment by the Railroad while riding in a taxi from a motel where he had spent the night to his place of work; (2) that the taxi driver was *not* an agent of the Railroad while transporting Mr. Tingstrom from the motel to the work place; and (3) that Mr. Tingstrom was not seriously injured in the accident, and that he was entitled to recover "only" $40,000 in general damages.

A. THE COURSE-AND-SCOPE-OF-EMPLOYMENT ISSUE.

At the time of the accident, Mr. Tingstrom was employed by Missouri Pacific Railroad as a locomotive engineer and was assigned to run the locomotive of a "spray train," the function of which is to spray herbicides along the railroad right of way. Mr. Pat Crabtree, the superintendent of the Louisiana division of Missouri Pacific Railroad testified (P. 706) that a crew working on a "work train," is subject to somewhat different rules from a crew operating a "through freight train." The crew of a through freight train crew does not work on an 8-hour per day basis, but rather on mileage basis. "You figure like 118 miles for a train crew is the same as eight hours . . ." and ". . . if they did that in 5 hours, they are paid the same as if it took them 12 hours basically." In other words, their pay continues even though they may have long arrived at their destination and gone to a motel to rest. Furthermore, "through train" crew members are considered "on call" while laying over and awaiting the arrival of the freight train which they are to run back to their base yard.

On the other hand, the crew of a work train works only during the day, is paid on an 8-hour day basis and their pay starts when they come to work and stops when they leave their train at whatever point they managed to get to during the day. Mr. Crabtree also testified (Pp. 650-1) that Missouri Pacific Railroad Company is obliged to provide lodgings for crews away from home, pursuant to a collective bargaining agreement reached between it and the Brotherhood of Locomotive Engineers. This agreement has been introduced into evidence. It goes into minute details what kind of accommodations the union demanded be provided, including the size of bed, kind of mattress, a reading lamp, etc. (702).

This Court's current decision relies primarily on *Empey v. Grand Trunk Western R. Co.*, 869 F.2d 293 (6th Cir. 1989), in which the court held that a member of a train crew who was utilizing lodging facilities provided by the Railroad, was within the course and scope of his railroad employment, because the railroad "encouraged" him (and other employees) to use the facilities. In this case, Mr. Crabtree's testimony makes it clear that far from forcing its employees to use the free lodging facilities, it is the Missouri Pacific Railroad which is forced by the Union to which Mr. Tingstrom belongs, to provide such facilities. In effect, the free lodgings are a fringe benefit the Union has insisted on and a Union member should no more be considered within the scope of his employment while enjoying these free accommodations, than while lying on the beach enjoying an extra holiday negotiated by the Union.

What further distinguishes Mr. Tingstrom's case from Mr. Empey's is that Mr. Tingstrom was not injured while staying at the motel at the Railroad's expense: He was injured while en

route from the motel to his work place in a taxi operated by a taxi driver with whom the motel management contracted to transport guests to and from the motel. These factual differences distinguish this case from *Empey* and require that the issues of defendant's liability to Mr. Tingstrom be submitted to the jury.

The *Empey* court made a careful distinction between the so-called commuter cases and the line of cases which could be described as "accommodations cases." Mr. Empey's case was an "accommodations" case. He was injured while staying at a motel which had a contract with Mr. Empey's railroad to provide accommodations for railroad employees while "laying over" between trains. The Court specifically stated that the jurisprudence relating to commuters was inapplicable. "Because Empey was not commuting to or from work at the time he sustained his back injuries ... we decline to apply the holding of these commuter cases to the instant case." Then, relying on two earlier "accommodations" cases *(Mostyn v. Delaware, L. & W. R. Co.,* 160 F.2d 15 (2nd Cir.), cert. denied, 332 U.S. 770, 68 Sup. Ct. 82, 92 L.Ed. 355 (1947); and *Carney v. Pittsburgh & Lake Erie Railroad Co.,* 316 F.2d 277 (3rd Cir.), cert. denied, 375 U.S. 814, 84 Sup. Ct. 45, 11 L.Ed. 2d 49 (1963), the Court concluded that where railroads provide shelter and food for their employees, which the employees "by custom and economic realities of the situation," are "encouraged" to use, they are to be considered within the scope of their employment while using such facilities.

The *Empey* court also made a careful distinction between the principles underlying the granting of FELA status to railroad employees using accommodations gratuitously supplied to them by their employer, and the principles under which the

negligence of a third party is imputed to a railroad for FELA purposes. In the accommodations cases, the FELA protection is extended under the principle that railroads have a nondelegable duty to provide their employees with a safe place to work, even on the premises of a third party. Whereas, under the imputation-of-negligence principle, negligence can only be imputed to a railroad when the third party is performing its "operational activities." The *Empey* court found these distinctions in the U.S. Supreme Court decisions in *Sinkler* and *Shenker*[1], and its own earlier decision in *Payne v. Baltimore & Ohio R. Co.*, 305 F.2d 546 (6th Cir. 1962), cert. denied, 374 U.S. 827, 883 Sup. Ct. 1865, 10 L. Ed. 2d, 1051 (1963).

B. THE IMPUTATION-OF-NEGLIGENCE ISSUE.

In *Sinkler,* the U.S. Supreme Court held that when "operational activities" of a railroad are performed by "others" — that is, by people other than the railroad's own employees — such "others" become agents of the railroad and their negligence may be imputed to the railroad for FELA purposes. However, the Court left it for the trier of fact to decide whether a given activity was or was not a "operational activity" of the railroad.

Sinkler involved switching of railroad cars in a railway station, done for the Missouri Pacific Railroad by another company. Clearly, switching of railroad cars in a railroad station is an operational activity of a railroad, therefore, the Supreme Court concluded the third-party's negligence which injured

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[1] *Sinkler v. Missouri Pacific R. Co.*, 356 U.S. 326, 78 Sup. Ct. 758, 2d L. Ed. 2d, 799 (1958); and *Shenker v. Baltimore & Ohio R. Co.*, 374 U.S. 1, 83 Sup. Ct. 1667, 10 L. Ed. 2d, 709 (1963).

Missouri Pacific's employee, was imputable to Missouri Pacific.

In *Shenker*, the plaintiff was loading a railroad car belonging to a third party in a railroad station which was managed and operated by plaintiff's employer. The Court there decided that imputation of negligence was not a relevant legal precept. Rather, the case was governed by the principle that the railroad has a nondelegable duty to provide its employees with a safe place to work, even when they are required to go on premises of a third party. Under this principle Mr. Shenker was held entitled to maintain an FELA claim against his railroad employer.

The *Payne* case, decided by the same court which decided *Empey*, involved a railroad employee who was killed when the box car in which he was riding, derailed on a private spur track and collided with the wall of a factory building. The car derailed because the owner of the spur track had permitted a large amount of trash to accumulate on the rails. As the *Empey* court specifically noted in *Payne*, it had declined to impute the spur owner's negligence to the railroad company based on the *Sinkler* agency doctrine, but decided the case on the basis that a railroad has the nondelegable duty to provide an employee with a safe place to work, even on premises which "it may not own, control or be under primary obligation to maintain."

The *Empey* decision, therefore, makes its entirely clear that the reason why the crew members who run regular trains are entitled to recover against their employer under the FELA when housed on third party's premises, is that such crew members are in effect "at work," even while resting at the lay-over

lodging place and therefore entitled to the protection of the safe-place-to-work doctrine. Therefore, if they are injured by an unsafe condition on these premises, they can pursue an FELA claim against the employer, regardless of any considerations of fault, direct or imputed.

The obvious reason why the *Empey* court distinguished and refused to apply the commuter cases, is that they do not involve unsafe premises but rather the operational negligence of a third party. That operational negligence may be imputed to the Railroad only when that third party is performing "operational activities" normally associated with the business of running a railroad. *Sinkler* makes it clear that the question of whether a given activity constitutes an "operational activity" of a railroad, is a jury question. All of the commuter cases cited by the *Empey* court hold that negligence in the operation of a conveyance which a railroad employee utilizes to commute to and from work, is not imputed to his railroad employer for FELA purposes. Indeed, even when the conveyance is operated by plaintiff's own employer, he may not press a claim against it under the FELA. In both *Metropolitan* and *Getty*, the plaintiff injured while commuting free-of-charge on a train operated by his own employer was held to have no FELA rights against the employer. Therefore, even if Mr. Tingstrom had been commuting from the New Port Inn to the railroad yard at Addis in a van owned by the Missouri Pacific Railroad and driven by a Missouri Pacific employee, he could not assert a damage claim against Missouri Pacific under FELA. Gratuitous conveyance of employees to and from work is simply not an "operational activity" of running a railroad.

This Court had decided to impute the cab driver's negligence to Missouri Pacific Railroad on the basis of a 1962

District Court decision in *Leek v. Baltimore & Ohio R. Co.*, 200 F.Supp 368 (U.S.D.C. N.D. W. Va., 1962). In *Leek*, there was a month-by-month agreement between the railroad and a cab company for daily transportation of groups of railroad employees who were on "company time," between designated points. The Court concluded that this evidence warranted the finding that the cab company was performing "operational activities" of the railroad. This Court finds our line of distinction between employees being conveyed from one place to another while *at* work, from those cases in which employees are conveyed *to* or *from* work, as "artificial." However, the *Leek* decision itself very clearly points out that what does or does not constitute "operational activities" involves some fine "line drawing," such as can only be done by the trier of fact. We quote:

> "Certainly, there must be many services performed by others under contract with the railroad, which are incidental or even necessary to the corporate purposes of the railroad, which are not 'operational activities' within the meaning of those words as employed in the *Sinkler* case. Just where the line should be drawn, I'm neither prepared nor called upon to specify."

In other words, the Court recognizes that the "line drawing" involves a finding of fact, which is for the jury to make, because not all taxi drivers who transport railroad employees, will be considered agents of the railroad for FELA purposes.

In sum, there is *no* Federal decision which holds that a commuting employee of a railroad is within the course and scope of his employment "as a matter of law," nor is there a decision which states that an independent cab operator who is conveying railroad employees from a place of accommodation gratu-

itously provided by the railroad to their place of work, is performing "operational activities of the railroad" *as a matter of law*. All the reviewed decisions are to the contrary. Thus, the question of whether the cab operator in this case was performing "operational activities" of the Railroad and whether his negligence could be imputed to Missouri Pacific Railroad Company was a jury question which the jury answered in the negative. Under the federal standard of review, this Court had no authority to overturn that jury determination.

IV.

ISSUE OF DAMAGES

With respect to this issue, the jury learned that in addition to the taxi cab driver, there were four passengers in the taxi: Mr. Bibbins, a conductor on the work train, on the front seat; Mr. Tingstrom in the left rear seat; Mr. James C. Yarborough, brakeman, in the middle rear seat; and Mr. Shrock, another member of the train crew in the right rear seat. Both Mr. Bibbins and Mr. Yarborough testified that they remained in their seats throughout the accident, and that all the others, including Mr. Tingstrom, remaining in their seats. The jury also saw photographs of three men seated in the rear seat of an identical vehicle and saw that there was only a small space between their knees and the back of the front seat. Therefore, it would have been impossible for anyone to have been knocked off his seat. They also saw photographs which showed that the door handle on the rear door of the car is recessed and at a level of an occupant's thigh, so that it was impossible for anyone to contact it with his back. However, Mr. Tingstrom reported to the doctors he saw after the accident, that in the accident, he had been knocked off the rear seat

and wound up on the floor between the rear seat and the back of the front seat and that the door handle in the door next to which he was seated, caused the scratches on his back which he displayed after the accident. Dr. Crittendon, the first doctor he saw, testified that he was led to believe that Mr. Tingstrom was "tossed about the taxi and ended up on the left side of the taxi, not the seat," and that "his back hit the door handle" (482). And Dr. Bazzone, Mr. Tingstrom's next doctor, was led to believe that "... he was apparently thrown forward, coming to rest between the rear seat and the back support of the front seat. So, from what I gather, he apparently was knocked off the seat or fell off the seat and came to lie on the floor between the front and the rear seats. He reported hitting his back against the door handle in the course of being thrown forward."

Additionally, the jury heard the investigating officer, Mr. John Gehling, testify that at the scene of the accident, the occupants of the taxi all indicated that they had their seat belts on and no one claimed any injuries. The jury also heard Mr. Tingstrom acknowledge that by March 21, 1988, within twelve days after the accident, he had already engaged the services of an attorney to handle his claim.

Based on this evidence, the jury was entitled to conclude that Mr. Tingstrom lied to his doctors in an effort to build his case for a recovery of damages against the defendant Railroad. The jury obviously did not believe anything Mr. Tingstrom had to say — including his claim that there were no seat belts in the cab — for they held him 50% at fault for not wearing one. (This was later overturned by the trial judge via JNOV.)

The jury also heard Dr. Crittendon testify that after seeing

Mr. Tingstrom twice and reviewing x-rays and a CT Scan, both of which were normal, he told Mr. Tingstrom to return to work on April 8.

The jury further heard Dr. Victor T. Bazzone, the neurosurgeon to whom Mr. Tingstrom was referred by Dr. Crittendon, testify that by August 8, 1988, he considered Mr. Tingstrom fully recovered (following the percutaneous disc surgery he had performed on him) and released him from his care. Finally, the jury heard the testimony of Baton Rouge neurosurgeon Dr. Allen Joseph. He testified that he had reviewed all of Mr. Tingstrom's medical records, which included the back x-rays taken March 9, 1988, a CT Scan done March 16, 1988, a myelogram done in May, 1988, and Dr. Bazzone's clinical findings on April 8, 1988, when Dr. Bazzone reported: "The patient has recuperated with conservative treatment, he still has slight degrees of tenderness in the low back, but overall, his neurological examination is improved, his straight-leg raising test is negative and sensation is in tact, as are deep-tendon reflexes, motor function and gait. I'm going to release him from my care and I will see him in my office on an as-needed basis. There is no disability associated with this injury."

Based on his review of these medical findings and the diagnostic studies, Dr. Joseph concluded that giving Mr. Tingstrom the benefit of the doubt, he may have sustained a mild back strain from which he should have recovered within a short time. "Six weeks and, at the very most, twelve weeks, is the upper limit of what I would expect based on the x-rays and my understanding of the accident, in the way of lingering spine pain" (P. 763). Certainly, he saw no reason for any surgical intervention (P. 753), either the percutaneous automated discectomy done by Dr. Bazzone (P. 754) nor the subsequent

surgery done by Dr. Jackson. Dr. Joseph acknowledged that Dr. Jackson had a reputation of subjecting people to surgeries where other physicians would not (Trans. P. 794).

This Court stated on Page 5 of its opinion, that "defendant produced no evidence to the effect that the surgeries were unnecessary." What would this Court suggest a defendant should do to prove this, other than produce a highly qualified neurosurgeon to say so? This Court also stated that we introduced no evidence to rebut Mr. Tingstrom's claims other than relying on "unsubstantiated claims that plaintiff was a dishonest malingerer." However, Dr. Joseph, while too polite to accuse Mr. Tingstrom of malingering directly, certainly did so implicitly. We quote:

> (P. 763)" . . . individuals that have a continuing problem with back and leg pain beyond that three months, or so, given essentially a normal myelogram and follow-up CT Scan and these other x-rays — is the presence of third-party liability or secondary gain of whatever sort ... I rarely ever see someone where you see this picture that lasts for months and months and there is surgery and more surgery and all that, where this is not a very important ingredient in it."
>
> (P. 774)" . . . because I see patients all the time and it is unusual for patients with these x-rays and a myelogram and a CT Scan that was normal, to have this much pain for this long. I almost never see it, except in situations where there is third-party liability."

Of course, the jury was entitled to believe Dr. Joseph and disregard the testimony of all the other medical witnesses, if it wished. This Court certainly has not indicated why the testimony of Dr. Joseph should have been disregarded by the jury. It appears to us that that testimony clearly supports the jury's

determination that Mr. Tingstrom is a "dishonest malingerer" and that the surgeries to which he submitted were unnecessary and done only to advance Mr. Tingstrom's damage claim against the defendant Railroad. The jury was entitled to conclude that Mr. Tingstrom sustained a moderate back sprain from which he should have recovered within six to twelve weeks. An award of $40,000 in general damages appears quite generous under those circumstances.

This Court also stated that defendants have produced no evidence to the effect that medical expenses incurred by Mr. Tingstrom were inaccurate. The "accuracy" of the medical expenses is not at issue. Defendants do claim that the expenses are not related to the taxi cab accident. Further, the total of these expenses has been paid under Travelers Insurance Company policy GA-23000, which is maintained by railroads for the benefit of their employees. These payments are not subject to the collateral source rule and cannot be recovered in this case by Mr. Tingstrom. *Lyons v. Southern Pacific Transp. Co.*, 684 F. Supp. 909 (W.D. La. 1988); *Wagner v. Redding Co.*, 428 F. 2d 289 (3rd Cir. 1970); *Folkestad v. Burlington Northern, Inc.*, 813 F. 2d 1377 (9th Cir. 1987); *Houghton v. Blackships, Inc.*, 462 F. 2d 788 (5th Cir. 1972).

As aforesaid, this Court gave no reasons as to why the jury should have disregarded Dr. Joseph's testimony, which clearly supports its findings. Existing jurisprudence militates against this Court's conclusions; thus, in *Breen v. Soileau*, 609 So.2d 864 (La. App. 5th Cir. 1992), the Court observed:

> "In this case, the jury rejected plaintiff's demand for damages, finding that they failed to prove that their injuries were caused by the accident. The medical testimony was uncontroverted, but it was based on the history given by

Mr. and Mrs. Breen. Apparently, the jury did not believe that severe injuries could have occurred from such a minor collision. This is a factual finding, which this Court may not modify in the absence of manifest error. *Arceneaux v. Domingue*, 365 So.2d 1330 (La. 1979)."

And as late as July 2 of this year, this Court observed in *Patterson v. City of Baton Rouge*, 622 So.2d 1386 (La. App. 1st Cir. 1993):

> "A reviewing court must do more than simply review the record for some evidence which supports or controverts the trial court's finding. It must review the record in its entirety to determine whether the trial court's finding was clearly wrong or manifestly erroneous. In making this determination, it may not substitute its own judgment for that of the trial court, but must determine whether the trial court's conclusion was reasonable in light of the evidence. *If there are two permissible views of the evidence, the fact finders choice between them cannot be manifestly erroneous or clearly wrong.* [Cite omitted — emphasis ours.]

V.

CONCLUSION

Applicants submit that the requested rehearing should be granted and after reconsideration of all of the above discussed issues, the original judgment of this Court should be reinstated.

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s/Boris F. Navratil
BORIS F. NAVRATIL (#9909)

CERTIFICATE

I HEREBY CERTIFY that a copy of the above and foregoing Application with supporting Brief has this day been mailed, properly addressed and postage prepaid, to all counsel of record, namely: counsel for Plaintiff/Appellant, **Mr. Russell A. Woodard, 114 North Trenton, Ruston, Louisiana 71270** and **Mr. Rebel G. Ryland, McKeithen & Ryland, P.O. Box 1029, Columbia, Louisiana 71418;** and counsel for Defendant/Appellee, William L. Smith d/b/a Smitty's Cab Service and LIGA, **Ms. Janice B. Unland, Aucoin & Unland, 3445 North Causeway Boulevard, Suite 501, Metairie, Louisiana 70002.**

Baton Rouge, Louisiana, this 29th day of October, 1993.

s/Boris F. Navratil
BORIS F. NAVRATIL (#9909)

APPENDIX F

COURT OF APPEAL, FIRST CIRCUIT

STATE OF LOUISIANA

RE: Docket Number 90/CA/2283R

GRANT TINGSTROM, III

—VERSUS— **Parish of West Baton Rouge**

WILLIAM L. SMITH D/B/A SMITTY'S CAB SERVICE, ET AL

On application for Rehearing.

Rehearing DENIED

s/Morris A. Lottinger
Lottinger, Morris A.

Foil, Frank

s/Kenneth J. Fogg
Fogg, Kenneth J.

s/Freddie Pitcher, Jr.
Pitcher, Freddie, Jr.

Parro, Randolph H.

"Foil, J., Dissent and would grant the rehearing."
"Parro, J., Dissent and would grant the rehearing."

Filed DEC 06 1993
s/STANLEY P. LEMOINE
STANLEY P. LEMOINE, Clerk

APPENDIX G

SUPREME COURT OF

THE STATE OF LOUISIANA

DOCKET NO.: 93 C 2776

GRANT TINGSTROM, III

VERSUS

WILLIAM L. SMITH D/B/A
SMITTY'S CAB SERVICE, ET AL

ON APPEAL TO THE COURT OF APPEAL,
FIRST CIRCUIT, FROM THE
18TH JUDICIAL DISTRICT COURT
PARISH OF WEST BATON ROUGE, LOUISIANA
NUMBER 21,537
HONORABLE EDWARD N. ENGOLIO,
JUDGE PRESIDING

APPLICATION OF DEFENDANT/APPELLEE,
MISSOURI PACIFIC RAILROAD COMPANY,
FOR A SUPERVISORY WRIT DIRECTED TO THE
COURT OF APPEAL, FIRST CIRCUIT

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REASON WHY THIS APPLICATION SHOULD BE GRANTED.

This Court has granted the application of plaintiff/appellant, Grant Tingstrom, III, for a writ of review, but has directed the Court of Appeal, First Circuit, to supply it with a "full opinion" in support of its appellate decision affirming the judgment of the trial court. Three judges of the Court of Appeal—over two dissents—have disregarded the clear wording of this Court's mandate and instead of preparing an opinion in support of the original unanimous decision, have overruled it. In so doing, the Court of Appeal has usurped this Court's jurisdiction and authority to correct or modify the original appellate decision from which no rehearing was sought by plaintiff. This constitutes an abuse by the Court of Appeal of its powers and calls for an exercise of this Court's supervisory authority.

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I.

STATEMENT OF THE CASE

Mr. Tingstrom has filed this suit to recover damages on account of injuries he allegedly sustained when a taxi in which he was riding collided with another vehicle. At the time of the accident, Mr. Tingstrom was employed by the Missouri Pacific Railroad Company as a locomotive engineer. The taxi he was riding in was taking him from a Port Allen, Louisiana, motel to the Missouri Pacific Railroad yard at Addis, Louisiana, where he was to resume operating the locomotive of a work train, which, on the previous day, he had run from Avondale, Louisiana to Addis. The motel where he had spent the night had a contract with the Railroad to provide accommodations to its employees free of charge to them. The taxi operator, in turn, had a contract with the motel to transport guests to and from the motel free of charge to them.

Mr. Tingstrom sued the taxi driver, alleging that his negligence caused the collision. He also sued his employer, Missouri Pacific Railroad, under the provisions of the Federal Employers Liability Act (FELA), alleging that he was in the course and scope of his employment when the accident occurred and that the taxi driver was an agent of the Railroad, whose negligence had to be imputed to the Railroad under the FELA, as interpreted by federal courts.

The suit was tried to a jury which rejected Mr. Tingstrom's claims against the Missouri Pacific Railroad and awarded him $40,000 in general damages against the taxi driver and his insurer. The jury also found Mr. Tingstrom 50% at fault for not wearing a seat belt, but this verdict was overturned by the trial court on plaintiff's motion for a JNOV.

Mr. Tingstrom appealed to the First Circuit Court of Appeal, claiming that the trial judge was in error in not adjudging the Railroad liable to him despite the jury's verdict and not granting an additur to the jury award. The Court of Appeal affirmed the judgment of the trial court in a unanimous opinion.

Mr. Tingstrom then applied to this Court for a writ of review. This Court granted the application and issued an order stating: "Granted and remanded to the Court of Appeal, First Circuit, for a full opinion."

On remand, the Court of Appeal, instead of preparing an opinion containing a more detailed explanation for its original decision, reversed its previous judgment and cast the Missouri Pacific Railroad for over $1 million.

The original Court-of-Appeal opinion was handed down by a three-judge panel composed of Judges Lottinger, Foil and Covington. By the time the case was remanded to the Court for a "full opinion," Judge Covington had retired. For reasons about which we can only speculate, the case was assigned to a five-judge panel. Ultimately, three judges of this panel decided to "revisit the appeal" and overrule the decision of the first panel, while the other two dissented. Judge Lottinger, who was a member of the first panel which unanimously affirmed the lower court judgment, authored the new opinion. The other remaining member of the first panel, Judge Foil, dissented, being of the opinion that the Court lacked authority to modify its previous judgment. Judge Parro joined Judge Foil in the dissent.

Missouri Pacific Railroad Company believes that the dissent has correctly formulated the law and that this Court should

now intervene and instruct the Court of Appeal to carry out the mandate to write a full opinion in support of its original judgment which only this Honorable Court has the authority to modify.

II.

ISSUE PRESENTED FOR REVIEW

As pointed out in Judge Foil's dissent, plaintiff did not apply to the Court of Appeal for a rehearing after its original decision was handed down on October 16, 1992. Insofar as the Court of Appeal was concerned, in the absence of a rehearing application filed at the latest by October 30, 1992, that decision became final. It was not until November 13, 1992, that that decision became final. It was not until November 13, 1992, that plaintiff filed in this Court his application for a writ of review, which resulted in this Court's request to the Court of Appeal for a full opinion. This Court, having granted plaintiff's writ and thus having assumed jurisdiction over the lawsuit, did the Court of Appeal have any authority to modify its previous judgment?

III.

ASSIGNMENT OF ERROR

After this Court granted plaintiff's application for a writ of review, it alone was empowered to modify the judgment in this case. The Court of Appeal therefore erred in reversing its previous, unanimous, decision.

IV.

ATTACHMENTS

(1) Copy of the original decision of the First Circuit Court of Appeal, dated October 16, 1992;

(2) Copy of this Court's Order dated December 21, 1992, granting plaintiff's application for a writ of review;

(3) Copy of the opinion of the Court of Appeal, First Circuit, dated October 15, 1993; and

(4) Copy of the Application for a Rehearing on behalf of the Missouri Pacific Railroad, filed in the Court of Appeal prophylactically and only to prevent applicant from being denied a rehearing in that court, should this Court determine the issue presented herein, adversely to the applicant.

WHEREFORE, Missouri Pacific Railroad Company prays that this Court issue a supervisory writ, directed to the Court of Appeal, First Circuit, notifying it that it is without jurisdiction to modify its original judgment affirming the judgment of the trial court, and directing it to prepare a "full opinion" in support of that judgment.

By Attorneys,

NAVRATIL, HARDY & BOURGEOIS
445 North Blvd., Suite 800
Post Office Box 3551
Baton Rouge, LA 70821
Tele: (504) 343-0700

s/Boris F. Navratil
BORIS F. NAVRATIL (#9909)

V.

AFFIDAVIT

STATE OF LOUISIANA

PARISH OF EAST BATON ROUGE

BEFORE ME, the undersigned Notary, personally came and appeared:

BORIS F. NAVRATIL,

who first being duly sworn, did depose and state that he is counsel of record for Defendant/Appellee, Missouri Pacific Railroad Company; that he has prepared the foregoing Application for Supervisory Writ; that all of the allegations contained therein are true and correct to the best of his knowledge and belief; and that a copy has this day been mailed, properly addressed and postage prepaid, to all counsel of record, namely: counsel for Plaintiff/Appellant, **Mr. Russell A. Woodard,** 114 North Trenton, Ruston, Louisiana 71270; and **Mr. Rebel G. Ryland,** McKeithen & Ryland, P.O. Box 1029, Columbia, Louisiana 71418; counsel for Defendant/Appellee, William L. Smith d/b/a Smitty's Cab

Service and LIGA, **Ms. Janice B. Unland**, Aucoin & Unland, 3445 North Causeway Boulevard, Suite 501, Metairie, Louisiana 70002, and to **Honorable Stanley P. Lemoine,** Clerk, Court of Appeal, First Circuit, 2237 S. Acadian Thruway, Suite 200, Baton Rouge, Louisiana 70808.

Baton Rouge, Louisiana, this 4th day of November, 1993.

s/Boris F. Navratil
BORIS F. NAVRATIL (#9909)

SWORN TO AND SUBSCRIBED before me this 4th day of November, 1993, at Baton Rouge, Louisiana.

s/David H. Hardy
NOTARY PUBLIC

APPENDIX H

SUPREME COURT OF

THE STATE OF LOUISIANA

DOCKET NO.: 94 C 0031

GRANT TINGSTROM, III

VERSUS

WILLIAM L. SMITH D/B/A
SMITTY'S CAB SERVICE, ET AL

ON APPEAL TO THE COURT OF APPEAL,
FIRST CIRCUIT,
FROM THE 18TH JUDICIAL DISTRICT COURT
PARISH OF WEST BATON ROUGE, LOUISIANA
NUMBER 21,537,
HONORABLE EDWARD N. ENGOLIO,
JUDGE PRESIDING

APPLICATION FOR A WRIT OF CERTIORARI
OR REVIEW ON BEHALF OF
DEFENDANT/APPELLEE, MISSOURI PACIFIC
RAILROAD COMPANY

SAM A. LeBLANC, III (#8207)
MARTIN A. STERN (#17154)
ADAMS AND REESE
4500 One Shell Square
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- and -

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I.

STATEMENT OF THE CASE

Mr. Tingstrom has filed this suit to recover damages on account of injuries he allegedly sustained when a taxi in which he was riding collided with another vehicle. At the time of the accident, Mr. Tingstrom was employed by the Missouri Pacific Railroad Company as a locomotive engineer. The taxi he was riding in was taking him from a Port Allen, Louisiana motel to the Missouri Pacific Railroad yard at Addis, Louisiana, where he was to resume operating the locomotive of a work train, which, on the previous day, he had run from Avondale, Louisiana to Addis. The motel where he had spent the night had a contract with the Railroad to provide accommodations to its employees free of charge to them. The taxi operator, in turn, had a contract with the motel to transport guests to and form the motel free of charge to them.

Mr. Tingstrom sued the taxi driver, alleging that his negligence caused the collision. He also sued his employer, Missouri Pacific Railroad, under the provisions of the Federal Employers Liability Act (FELA), alleging that he was in the course and scope of his employment when the accident occurred and that the taxi driver was an agent of the Railroad, whose negligence had to be imputed to the Railroad under the FELA, as interpreted by federal courts.

The suit was tried to a jury which rejected Mr. Tingstrom's claims against the Missouri Pacific Railroad and awarded him $40,000 in general damages against the taxi driver and his insurer. The jury also found Mr. Tingstrom 50% at fault for not wearing a seat belt, but this verdict was overturned by the trial court on plaintiff's motion for a JNOV.

Mr. Tingstrom appealed to the First Circuit Court of Appeal, claiming that the trial judge erred in not adjudging the Railroad liable to him, despite the jury's verdict, and not granting an additur to the jury award. The Court of Appeal affirmed the judgment of the trial court in a unanimous memorandum opinion.

Mr. Tingstrom then applied to this Court for a writ of review. This Court granted the application and issued an order stating: "Granted and remanded to the Court of Appeal, First Circuit, for a full opinion." 92-C-2976.

On remand, the Court of Appeal, instead of preparing an opinion containing a more detailed explanation for its original decision, reversed its previous judgment and cast the Missouri Pacific Railroad for over $1 million.

Believing that the second Court of Appeal decision, which re-decided the appeal, was *ultra vires*, Missouri Pacific applied to this Court for a supervisory writ, which is still pending under Docket No. 93-C-2776. If the relief prayed for by Missouri Pacific Railroad in that application is ultimately granted by this Court, the instant application for a remedial writ will become moot. The instant application is being submitted at this time, to preserve the applicant's rights to have this Court review the second decision of the Court of Appeal, in the event this Court denies the remedial writ sought by Applicant.

II.

ASSIGNMENT OF ERRORS.

1. The Court of Appeal erred in concluding that existing federal decisions mandated its finding that Mr. Tingstrom was within the course and scope of his employment as a loco-

motive engineer employed by the Missouri Pacific Railroad, while being gratuitously transported from a motel where he had spent the night to his place of work at the railroad yard.

2. The Court of Appeal erred in concluding that a taxi driver conveying railroad employees from a motel where they spent the night to their place of work at the railroad yard, was performing "operational activities of the railroad" and thus became the railroad's agent, whose negligence could be imputed to the railroad, under provisions of the Federal Employers Liability Act.

3. The Court of Appeal erred in substituting its evaluation of the evidence for that of the jury and overturning the jury verdict which awarded to Mr. Tingstrom $40,000 in general damages and rejected his other damage claims.

III.

STATEMENT OF REASONS FOR REVIEW PURSUANT TO RULE X, § 1(a)

The foregoing errors merit a review by this Court under Section 1(a) of Rule X of the rules of this Court, because the Court of Appeal erroneously applied the principles of the Federal Employers Liability Act as interpreted in decisions of the United States Supreme Court and others federal courts — which are binding on state courts in FELA litigation. Further, the Court of Appeal has abused its powers in setting aside a jury verdict which is fully supported by the evidence in the record and substituting its own conclusions and inferences — including an assessment of plaintiff's credibility — for those made by the jury. The Court of Appeal thus acted directly contrary to the principle established by the U.S. Supreme

Court in *Tennant v. Peoria & P. U. Ry. Co.*, 121 U.S. 802, 65 S.Ct. 610 (1944), and since followed in innumerable decisions handed down by Federal Courts in FELA cases, to-wit:

> "Courts are not free to re-weigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more equitable."

IV.

ARGUMENT OF SPECIFICATION OF ERROR NO. 1:

The Court of Appeal has in effect held that the decision of the federal appeals court in *Empey v. Grand Trunk Western R. Co.*, 869 F.2d 293 (6th Cir. 1989), compelled the finding that Mr. Tingstrom, the plaintiff in this case, was "as a matter of law," within the course and scope of his employment by the defendant Railroad, while he was being transported by private taxi from a motel where he had spent the night at the Railroad's expense, to his place of work. However, the *Empey* case is distinguishable from this case for a number of reasons.

Mr. Empey was held to have been within the course and scope of his employment by the Grand Trunk Western Railroad, while he was utilizing overnight lodgings provided by the Railroad which the Railroad "encouraged" its employees — Mr. Empey included — to utilize. In this case, Mr. Tingstrom was not injured while he was staying at the New Court Inn, where accommodations were made available to him free-of-charge by the defendant Railroad. However, even if he had been injured at the motel, there would have been valid grounds to distinguish his case from that of Mr. Empey: (a)

because the division superintendent of the defendant Railroad in this case testified that the free lodgings were supplied to its employees as a fringe benefit mandated by the Brotherhood of Locomotive Engineers, not because such accommodations are necessary to the accomplishment of the Railroad's business; and (b) because unlike Mr. Empey, Mr. Tingstrom was not "on call" while staying at the motel. He was operating a work train during regular day time working hours. He was not "laying over" between on-line freight trains, which have unpredictable arrival and departure times.

Further, Mr. Tingstrom in this case was injured while riding a private taxi between the motel and his place of work; in other words, while he was commuting from his "home away from home" to this place of work. *Empey* carefully distinguished an unbroken line of cases which hold that Railroad employees injured while commuting to and from work *may not* maintain FELA claims against their railroad employers, because they *are not* within the course and scope of their employment while commuting. The *Empey* court specifically stated:

> "Because Empey was not commuting to or from work at the time he sustained his back injuries ... we decline to apply the holding of these commuter cases to the instant case."

Therefore, the *Empey* court applied principles reached earlier in so-called "accommodations" cases *(Moston v. Delaware L. & W. R. Co.*, 160 F.2d 15 (2d Cir., *cert. denied*, 332 U.S. 770, 68 Sup. Ct. 82, 92 L. Ed. 355 (1947); *Carney v. Pittsburg & Lake Erie Railroad Co.*, 316 F.2d 277 (3rd Cir., *cert. denied*, 375 U.S. 814, 84 Sup. Ct. 45, 11 L. Ed. 2d, 49 (1963), wherein the Courts concluded that employees who, by

"custom and economic reality" avail themselves of shelter and food provided by their employers, are to be considered within the scope of their employment while using such facilities.

Mr. Tingstrom's case is governed by the line of cases carefully distinguished in *Empey,* which uniformly hold that railroad employees have no right to proceed against their employer to recover damages under the FELA for injuries they sustain while commuting.

ARGUMENT OF SPECIFICATION OF ERROR NO. 2.

The *Empey* case, relied on by the Court of Appeal in overturning the jury verdict, also carefully distinguished between the principle under which FELA status is granted to railroad employees using accommodations gratuitously supplied to them by their employers and the principle under which the negligence of a third party may be imputed to a railroad for FELA purposes. In the accommodations cases, FELA status is extended under the principle that railroads have a non-delegable duty to provide their employees with a safe place to work, even though they may be working on the premises of a third party. Once the employee who is using the gratuitously-provided accommodations is determined to be actually "at work" while using such accommodations, the non-delegable duty to provide him with a safe place to work comes into being. On the other hand, the negligence of a third-party may only be imputed to a railroad when the third party is performing the railroad's "operational activities", per *Sinkler v. Missouri Pacific R. Co.,* 356 U.S. 326, 78 Sup. Ct. 758, 2d L. E. 799 (1958); and *Shenker v. Baltimore & Ohio R. Co.*, 374 U.S. 1, 83 Sup. Ct. 16, 67, 10 L. E. 2d, 709 (1963). In *Sinkler*, the U.S. Supreme Court set down the broad rule that when the

"operational activities" of a railroad are performed by someone other than the railroad's own employees, such other parties become agents of the railroad whose negligence may be imputed to the railroad for FELA purposes. However, the Court left it for the trier of fact to decide what constitutes an "operational activity of the railroad" in any given case. In *Sinkler*, the activity under consideration was the switching of railroad cars owned by the Missouri Pacific Railroad, which was being conducted by another company. The Court concluded that since the switching of its cars was clearly an operational activity of the Missouri Pacific Railroad, the negligence of the third party in switching the cars which injured a Missouri Pacific employee would be imputed to the Missouri Pacific Railroad.

In *Shenker*, plaintiff was injured due to the negligence of a third party while loading the third party's railroad car at a station managed and operated by the railroad by which he was employed. The Court held that the imputation-of-negligence principle was inapplicable. Rather, the case was governed by the principle that railroads have a non-delegable duty to provide their employees with a safe place to work. It was under this principle that Mr. Shenker was held entitled to maintain an FELA claim against his railroad employer.

Clearly, the reason why the *Empey* court refused to apply the holdings in commuter cases to Mr. Empey, is that those cases do not involve unsafe premises, but rather some operational negligence of a third party. Such operational negligence may be imputed to the railroad which employs the FELA plaintiff only when the third party was performing that railroad's "operational activities," i.e. activities normally associated with the business of running a railroad. All of the com-

muter cases cited in *Empey* hold that the operation of a conveyance used by a railroad employee to commute to and from work is ***not*** an operational activity of his railroad employer, therefore any negligence in the operation of such a conveyance which injures the railroad employee, ***may not*** be imputed to his employer, for FELA purposes.

In the case before us, the Court of Appeal relied on *Leek v. Baltimore & Ohio R. Co.*, 200 F.Supp. 368 (U.S.D.C., N.D. W. Va., 1962), for its decision to impute the cab driver's negligence to Mr. Tingstrom's employer. However, the *Leek* case bears no factual similarity to this case. *Leek* involved a month-to-month agreement between the railroad which employed Mr. Leek and a cab company for daily transportation of groups of railroad employees between designated points while they were actually at work. The *Leek* Court concluded that transportation of employees between work stations qualified as an "operational activity" of Mr. Leek's railroad employer.

The Court below labeled as "artificial" the line of distinction between railroad employees who are conveyed from one place to another while at work and those who are conveyed to or from work. However, the *Leek* court itself recognized that the decision of what does or does not constitute "operational activities" of a railroad involves some "fine line-drawing" *which is to be done by the trier of fact, not the Court* in a jury case. The federal district judge in *Leek* stated:

> "Certainly, there must be many services performed by others under contract with a railroad, which are incidental or even necessary to the corporate purposes of the railroad, which are not 'operational activities' within the meaning of those words as employed in the *Sinkler* case. Just where

the line should be drawn, I am neither prepared *nor called upon* to specify." [Emphasis ours.]

The question of whether the driver of Mr. Tingstrom's cab was performing "operational activities" of Missouri Pacific Railroad and whether his negligence should be imputed to the Missouri Pacific Railroad was a jury question, which the jury was entitled to and did answer in the negative.

Under federal standards of appellate review by which state courts are bound in FELA cases, the Court of Appeal had no right to overturn this jury determination.

ARGUMENT OF SPECIFICATION OF ERROR NO. 3.

Mr. Tingstrom claimed that as a result of the collision, he was thrown from the left rear seat of the cab which he occupied, onto the floor of the cab and that scratches on his back, which he displayed after the accident, came from a broken door handle, which his body contacted on the way down to the floor. This is also the story he gave to his doctors who, based on this description of an apparently drastic traumatic event, concluded that he sustained a low-back strain. Mr. Tingstrom's two co-workers who sat on the back seat next to him and the driver and another passenger on the front seat, all testified they remained in their seats throughout the accident and did not see Mr. Tingstrom leave his seat. Furthermore, photographs of three men seated in the rear seat of an identical vehicle, proved beyond any doubt that there was simply no room for anyone to be knocked off the seat and wind up on the floor between the seats, nor was the door handle in a location where it could conceivably contact Mr. Tingstrom's back. The jury obviously — and properly — concluded that Mr. Tingstrom lied about his injuries. It, therefore, accepted the

testimony of Dr. Allen Joseph, a recognized neurosurgeon, that his review of x-rays, CT Scans and other diagnostic studies convinced him that Mr. Tingstrom sustained no injury to his back, beyond, perhaps, a transient low back strain.

Mr. Tingstrom ultimately submitted to low back surgery and incurred $42,000 in medical expenses. He complains about the jury's failure to make any award to him for the medical expenses against the taxi driver. The reason is that there is absolutely no evidence in the record on the basis of which the jury could segregate those medical expenses incurred by Mr. Tingstrom which were reasonably attributable to the mild back strain the jury apparently concluded he sustained. To put it differently, Mr. Tingstrom did not prove up those medical expenses. As for the defendant Railroad, any award to Mr. Tingstrom for medical expenses would be improper, for all medical expenses incurred by him had been paid under a group medical benefit policy, Travelers Insurance Policy Number GA23000. These payments are not subject to the collateral source rule because the policy is fully funded by the Railroad. Therefore, medical expenses paid under this policy may not be recovered by the plaintiff in an FELA suit. *Lines v. So. Pac. Transp. Co.*, 684 F.Supp. 909 (W.D. La. 1988); *Houghton v. Blackships, Inc.*, 462 F.2d 788 (5th Cir. 1972); *Folkestad v. Burlington Northern, Inc.*, 813 F.2d 1377 (9th Cir. 1987).

In substituting its judgment for that of the jury, the court below transgressed not only against the standards of appellate review established by federal courts in FELA cases, but also those established in Louisiana law for appellate review generally, including its own pronouncement in *Patterson v. City of Baton Rouge*, 622 So.2d 1386 (La. App. 1st Cir. 1993). The

First Circuit Court of Appeal there held that a reviewing court may not substitute its own judgment for that of the trial court, but must determine "whether the trial court's conclusion was reasonable in the light of the evidence. If there are two permissible views of the evidence, the fact finder's choice between them cannot be manifestly erroneous or clearly wrong." Of course, in so holding, the First Circuit Court of Appeal merely paid obeisance to this Court's instruction in *Stobart v. State through DOTD*, 617 So.2d 880 (La. 1993), wherein this Court invalidated the First Circuit's earlier attempt to overturn a trial court judgment on merely factual grounds.

In this case, the jury did hear conflicting evidence concerning Mr. Tingstrom's alleged injuries. However, it was forced to conclude — on the basis of uncontrovertible physical evidence — that Mr. Tingstrom lied to his doctors when he claimed that he had been thrown from his seat and bounced around the interior of the cab and that the scratch on his back resulted from this. Consequently, the jury was within its rights to reject those doctors' diagnoses which were based on this untrue story. Instead, the jury accepted the testimony of Dr. Joseph, that diagnostic studies of Mr. Tingstrom's back revealed no objective signs of any injury. On the basis of Dr. Joseph's testimony — and bending over backwards in Mr. Tingstrom's favor — the jury evidently concluded that he sustained a mild back strain from which he should have recovered on fairly short order. For this, the jury awarded to Mr. Tingstrom $20,000 ($40,000 less 50% it assigned to him as contributory negligence) — a rather generous award.

The proper view of the jury's award in this case is that adopted by the Fifth Circuit Court of Appeal in *Breen v. Soileau*, 609 So.2d 864 (1992):

"In this case, the jury rejected plaintiffs' demand for damages, finding that they failed to prove that their injuries were caused by the accident. The medical testimony was uncontroverted, but it was based on the history given by Mr. and Mrs. Breen. Apparently, the jury did not believe that severe injuries could have occurred from such a minor collision. This is a factual finding, which this Court may not modify in the absence of manifest error. *Arceneaux v. Domingue*, 365 So.2d 1330 (La. 1979)."

V.

CONCLUSION.

WHEREFORE, applicant, Missouri Pacific Railroad, prays that the Writ of Review issue and the errors committed by the Court of Appeal, First Circuit be corrected, to the end that the judgment of the trial be affirmed in its entirety.

By Attorneys,

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Tele: (504) 581-3234
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SAM A. LeBLANC, III (#8207)
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- and -

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Post Office Box 3551
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Tele: (504) 343-0700
s/Boris F. Navratil
BORIS F. NAVRATIL (#9909)

VI.

AFFIDAVIT

STATE OF LOUISIANA

PARISH OF EAST BATON ROUGE

BEFORE ME, the undersigned Notary, personally came and appeared:

BORIS F. NAVRATIL,

who first being duly sworn, did depose and state that: He is counsel for Defendant/Appellee, Missouri Pacific Railroad Company; that he has prepared the foregoing Writ for Certiorari or Review; that all of the allegations contained therein are true and correct to the best of his knowledge and belief; and that a copy has this day been mailed, properly addressed and postage prepaid, to all counsel of record, namely: counsel for Plaintiff/Appellant, **Mr. Russell A. Woodard, 114 North Trenton, Ruston, Louisiana 71270** and **Mr. Rebel G. Ryland, McKeithen & Ryland, P.O. Box 1029, Columbia, Louisiana 71418;** counsel for Defendant/Appellee, William L. Smith d/b/a Smitty's Cab Service and LIGA, **Ms. Janice B. Unland, Aucoin & Unland, 3445 North Causeway Boulevard, Suite 501, Metairie, Louisiana 70002** and to **Honorable Stanley P. Lemoine, Clerk, Court of Appeal, First Circuit, 2237 S. Acadian Thruway, Suite 200, Baton Rouge, Louisiana 70808.**

Baton Rouge, Louisiana, this 5th day of January, 1994.

s/Boris F. Navratil
BORIS F. NAVRATIL (#9909)

SWORN TO AND SUBSCRIBED before me this 5th day of January, 1994, at Baton Rouge, Louisiana.

s/David H. Hardy
NOTARY PUBLIC

APPENDIX I

THE SUPREME COURT OF THE STATE OF LOUISIANA

GRANT TINGSTROM, III

VS. NO. 93-C - 2776

WILLIAM L. SMITH D/B/A
SMITTY'S CAB SERVICE ET AL

IN RE: Missouri Pacific Railrd. Co.; - Defendant(s); Applying for Writ of Certiorari and/or Review; to the Court of Appeal, First Circuit, Number CA90-2283, 90CA-2283; Parish of West Baton Rouge 18th Judicial District Court Div. "C" Number 21,537

February 4, 1994

Denied.

ROO
WFM
JLD
JCW
HTL
PH
CDK

CALOGERO, C. J., not on panel.

Supreme Court of Louisiana
February 4, 1994

s/Frans J. Labranche, Jr.
Clerk of Court
For the Court

APPENDIX J

THE SUPREME COURT OF THE STATE OF LOUISIANA

GRANT TINGSTROM, III

VS. NO. 94-C - 0031

WILLIAM L. SMITH D/B/A
SMITTY'S CAB SERVICE ET AL

IN RE: Missouri Pacific Railrd. Co.; - Defendant(s); Applying for Writ of Certiorari and/or Review; to the Court of Appeal, First Circuit, Number CA90-2283, Parish of West Baton Rouge 18th Judicial District Court Div. "C" Number 21, 537

February 4, 1994

Denied.

ROO
WFM
JLD
JCW
HTL
PH
CDK

CALOGERO, C. J., not on panel.

Supreme Court of Louisiana
February 4, 1994

s/Frans J. Labranche, Jr.
Clerk of Court
For the Court

APPENDIX K

SUPREME COURT

STATE OF LOUISIANA

DOCKET NO.: 92 C 2976

GRANT TINGSTROM, III,
Plaintiff

VERSUS

WILLIAM L. SMITH D/B/A
SMITTY'S CAB SERVICE,
COMCO INSURANCE COMPANY,
MISSOURI PACIFIC RAILROAD COMPANY
AND UNION PACIFIC RAILROAD COMPANY,
Defendants-Applicant

APPLICATION OF DEFENDANT
MISSOURI PACIFIC RAILROAD COMPANY
FOR REHEARING OF WRIT OF CERTIORARI
GRANTED AND EFFECTIVELY REVERSING
A JUDGMENT OF THE FIRST CIRCUIT
COURT OF APPEAL

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SUPREME COURT

STATE OF LOUISIANA

DOCKET NO.: 92 C 2976

GRANT TINGSTROM, III,
Plaintiff

VERSUS

WILLIAM L. SMITH D/B/A
SMITTY'S CAB SERVICE,
COMCO INSURANCE COMPANY,
MISSOURI PACIFIC RAILROAD COMPANY
AND UNION PACIFIC RAILROAD COMPANY,
Defendants-Applicant

APPLICATION OF REHEARING

NOW INTO COURT, through undersigned counsel, comes defendant[-]applicant, Missouri Pacific Railroad Company, which for the reasons more fully set forth in the attached memorandum, respectfully requests that this Honorable Court grant it rehearing of the granting of a Writ of Certiorari reversing a jury verdict finding defendant to be free of liability casting defendant in judgment in excess of one million ($1,000,000) dollars.

Respectfully submitted,

ADAMS AND REESE

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading has been forwarded to all counsel of record by placing same in the U.S. mails, postage prepaid and properly addressed, this 18 day of February, 1994.

s/Sam A. LeBlanc, III

MEMORANDUM IN SUPPORT OF APPLICATION FOR REHEARING

A. INTRODUCTION

This application for rehearing comes before the Court following a series of procedural steps which effectively resulted in the grant of plaintiff's application for Writ of Certiorari, reversing the First Circuit Court of Appeal's decision on the merits of the case, which had affirmed the jury verdict in applicant's favor.

As shown below, rehearing should be granted for the simple reason that the opinion adopted by this Honorable Court is in violation of United States Supreme Court precedent applicable to FELA cases which holds that a jury verdict may be reversed only where there is a *complete absence* of probative facts supporting the jury verdict.

B. PROCEDURAL HISTORY

Following a jury verdict in favor of applicant Missouri Pacific Railroad Company ("Missouri Pacific") plaintiff appealed to the First Circuit Court of Appeal. On October 16, 1992, the Court of Appeal affirmed the judgment rendered by the trial court.[1] Rather than seeking rehearing at the appellate level, plaintiffs applied for Writ of Certiorari and/or Review with this Court. On December 21, 1992, in Case No. 92-C-

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1 A copy of the judgment of the First Circuit Court of Appeal rendered on October 16, 1992 is attached as Exhibit A.

2976, this Court "granted and remanded to the Court of Appeal, First Circuit, for a full opinion."[2]

Although Appellate Court Rule 2-16.1(A)(1) provides that a full opinion is merely one which gives a full statement of the reasons supporting the Court's judgment, the Court of Appeal erroneously operated under the assumption that this Court had vacated its earlier decision and on October 15, 1993, rendered a second opinion, reversing its original decision and the jury verdict in favor of Missouri Pacific.[3]

Missouri Pacific's application for rehearing to the First Circuit Court of Appeal, Docket No. 90-CA-2283R, was denied in a split decision on December 6, 1993. Missouri Pacific also filed applications with this Court for Writs of Certiorari and/or Review, both of which were denied on February 4, 1994.[4]

Meanwhile, although this Court had asked for a full opinion from the First Circuit Court of Appeal, it rendered no decision on plaintiff's original application for Writ of Certiorari and/or Review after the second opinion of October 15, 1993 was received. Thus, when this Honorable Court denied Missouri Pacific's application for Writ of Certiorari and/or Review following the First Circuit Court of Appeal's second opinion, it implicitly adopted that second opinion as its own.

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[2] A copy of this Court's decision to grant plaintiff's writ application is attached as Exhibit B.

[3] A copy of the second opinion of the First Circuit Court of Appeal, Case No. 90-C.A.-2283R is attached as Exhibit C.

[4] Copies of this Court's decisions denying Missouri Pacific Railroad Company's (Missouri Pacific) applications for writ of certiorari and/or review in case Nos. 94-C-0031 and 93-C-2776 are attached as Exhibits D and E respectively.

Consequently, Missouri Pacific, while cognizant of Supreme Court Rule IX(6), submits this application for rehearing challenges much more than a mere grant or denial of a writ application; it is in effect an application for rehearing from the grant of a Writ of Certiorari which reversed a judgment of the First Circuit Court of Appeal on the merits of the case.

C. THE OPINION ADOPTED BY THIS HONORABLE CURT IGNORES THE APPLICABLE STANDARD UNDER FELA FOR REVIEWING FACTUAL DETERMINATIONS BY THE JURY

After listening attentively to numerous hours of testimony relative to injuries plaintiff may or may not have suffered, medical expenses which may or may not have been necessarily incurred, and wages which may or may not have been lost, the jury returned a verdict against a separate defendant for $40,000. In FELA cases, the standard of review to reverse a factual finding of a jury is not merely whether the court finds the jury's verdict to be clearly erroneous, but rather, the higher standard in FELA cases requires the court to find a *"complete absence"* of probative facts to support the verdict. *Dennis v. Denver and Rio Grande Western Railroad,* 375 U.S. 208, 84 S.Ct. 291, 11 L.Ed.2d 56 (1963)(emphasis added).[5]

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[5] In *Youn v. Maritime Overseas Corp.*, 623 So.2d 1257, 1260-61 (La.App. 1993), this Court recently addressed the role of an appellate court in reviewing a general damage award finding that the appellate court's role is "not to decide what it considers to be an appropriate award, but rather to review the exercise of discretion by the trier of fact, [noting further], that the discretion vested in the trier of fact is 'great' and even vast, so that an appellate court should rarely disturb an award of general damages." It is interesting to note that the standard to reverse a jury verdict in FELA cases is even more onerous.

Significantly, with respect to the jury's award of $40,000 for past, present and future pain and suffering, the Court of Appeal held in its second opinion that the judgment was "unsupported by probative facts," but not that there was a *complete absence* of probative facts.[6] Thus, while there arguably would have been sufficient basis to reverse the jury verdict if this were an action under Article 2315, according the First Circuit's own holding, there was not sufficient basis to reverse the jury verdict in this FELA action.

Importantly, there was not, in fact, a *complete absence* of probative facts upon which the jury verdict was based. At trial, the jury heard testimony from Mr. Bibbins, a conductor on the work train, and Mr. James Yarborough, a brakeman, both passengers in the taxi cab in which plaintiff was allegedly injured. Both Bibbens and Yarborough testified that throughout the accident, all passengers, including Mr. Tingstrom, remained in their seats.

Second, the jury considered photographs which indicated that there was only a small space between the passenger's knees and the back of the front seat of the cab. This contradicted plaintiff's testimony that he was knocked off his seat.

Third, the jury considered photographs that showed the location of the door handle on the rear door as recessed and at passenger's thigh level. This contradicted information provided by Mr. Tingstrom to physicians that his back hit the door handle or that he was knocked to the floor between the rear seat and the back of the front seat and the door handle somehow caused scratches on his back.

---

[6] See Exhibit C at page 9.

Fourth, the jury heard testimony from the investigating officer, Mr. John Gehling, that following the accident all occupants of the taxi indicated they had their seat belts on and no passenger claimed to have suffered any injuries.

Fifth, the jury heard testimony from Dr. Crittendon, who, after examining Mr. Tingstrom twice and reviewing x-rays and a CT scan, both of which were normal, told plaintiff he could return to work.

Sixth, the jury heard from [the] Dr. Victor T. Bazzone, a neurosurgeon, who testified that by August 8, 1988, he considered plaintiff fully recovered and released him from his care.

Seventh, the jury heard testimony of a neurosurgeon, Dr. Alan Joseph, who after reviewing all of Mr. Tingstrom's medical records concluded, **"[t]here is no disability associated with his injury,"** but rather only that plaintiff may have sustained a mild back strain from which he should have recovered within a short time (emphasis added). Furthermore, Dr. Joseph testified that he saw no reason for any surgical intervention, including neither that done by Dr. Bazzone nor the subsequent surgery by Dr. Jackson.

The credibility of a witness and how much weight to give to a particular witness's testimony is clearly within the province of the jury. The above-listed seven items do not consist of the entirety of the testimony heard by the jury, but are certainly "probative facts" upon which the jury based its finding of damages of only $40,000. By definition, the above items preclude a finding of a *complete absence* of probative facts relative to the issues of damages. The jury was entitled to conclude that plaintiff sustained only a moderate back sprain, as testified to by Dr. Joseph, from which he should have recov-

ered within 6 to 12 weeks, and for which he was entitled to only $40,000 in damages. Thus, the Court of Appeal's second opinion, which has now been adopted by this Court, violates clear United States Supreme Court precedent in erroneously supplanting the jury's verdict with its own. *Dennis v. Denver and Rio Grande Western Railroad,* 375 U.S. 208, 84 S.Ct. 291, 11 L.Ed.2d 56 (1963).

D. THE COURT OF APPEAL ERRONEOUSLY DEPRIVED THE JURY OF THE OPPORTUNITY TO DECIDE CERTAIN ISSUES OF FACT

At trial, the jury found that plaintiff was not in the course and scope of his employment at the time of the accident and that William Smith was not an agent of Missouri Pacific. When this case was remanded to the First Circuit Court of Appeal, it recognized that "[t]he standard of review for factual determinations in FELA cases has been articulated as follows: 'only when there is a **complete absence** of probative facts to support the conclusion reached by the jury does reversible error occur.'" (See Exhibit C at page 4, citing, *Dennis v. Denver and Rio Grande Western Railroad Co.,* 375 U.S. 208, 84 S.Ct. 291, 11 L.Ed.2d 56 (1963)(emphasis added).

With respect to the issue of whether the plaintiff was in the course and scope of his employment at the time of the injury, the Court of Appeal found the issue to have been improperly submitted to the jury on the belief there was no evidence submitted by Missouri Pacific from which the jury could have concluded that plaintiff was not in the course and scope of his employment. This is wrong. There was significant evidence not only for the issue to be submitted to the jury, but also for

the jury to have found in Missouri Pacific's favor, that is, that plaintiff was not in the course and scope of his employment.

Under the standard applied in FELA cases, if Missouri Pacific can point to a single probative fact, then plaintiff cannot secure reversal of the jury verdict under the "complete absence" standard. Missouri Pacific points to the following probative facts: Evidence adduced at trial proved that plaintiff was not on call at the time of the accident and, furthermore, that he did not begin to earn wages until he reached the railroad depot and assumed his duties as locomotive engineer on a work train. Thus, there was also insufficient basis under the applicable standard to reverse the jury's verdict on the course and scope issue.

Significantly, the second opinion is not saved by *Empey v. Grand Trunk Western R.R.*, 869 F.2d 293 (6th Cir. 1989). In *Empey*, an employee was injured while making use of housing which his employer provided and implicitly encouraged him to use. In this case, however, the housing provided for the plaintiff was the direct result of a collective bargaining agreement negotiated on the plaintiff's behalf by his union. The plaintiff, through his union, argued and negotiated for such housing. In effect, plaintiff chose his own accommodations. Furthermore, the evidence at trial proved that motel management contracted with the local taxi company to provide transportation for the workers. The hotel called the taxi and actually paid for its services, not Missouri Pacific. Most importantly, *Empey* is inapplicable because it is an accommodation case, in which the court specifically declined to apply the reasoning and holdings of commuter cases which have consistently found workers commuting to and from work not to be in the course and scope

of their employment. *Getty v. Boston and Maine Corporation*, 505 F.2d 1226, 1228 (1st Cir. 1974); *Metropolitan Coal Company v. Johnson*, 265 F.2d 173, 178 (1st Cir. 1959); *Sassaman v. Pennsylvania R. Co.*, 144 F.2d 950 (3rd Cir. 1944); *Young v. New York, N.H. & H.R. Co.*, 74 F.2d 251 (2d Cir. 1934).

For any and all of the reasons above, the course and scope issue was properly before the jury and the jury was justified in finding plaintiff was not in the course and scope of his employment and that the taxi driver was not Missouri Pacific's agent. No only was there enough factual evidence to support the jury's finding, but clearly, there was not a **"complete absence"** of probative facts supporting the jury's verdict. Accordingly, under controlling precedent, there was no basis to warrant taking this issue from the jury.

Finally, Missouri Pacific does not wish to burden the Court with arguments previously presented, but will simply re-aver all arguments previously made by Missouri Pacific including, but not limited to, issues of whether:

1. that plaintiff was not in the course and scope of his employment at the time of his alleged injuries;

2. that the taxi driver was not an agent of Missouri Pacific at the time of accident;

3. that all of jury's findings were supported by testimony adduced at trial; and

4. that the jury instructions provided by the Court were an accurate statement of the law and thus did not amount to reversible error.

E. CONCLUSION

Wherefore, applicant Missouri Pacific Railroad prays that its application for rehearing be granted and the First Circuit Court of Appeal second opinion rendered October 15, 1993, be reversed reinstating both the First Circuit Court of Appeal original opinion rendered October 16, 1992, and the jury verdict rendered in the 18th Judicial District Court, Parish of West Baton Rouge, Louisiana.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading has been forwarded to all counsel of record by placing same in the U.S. mails, postage prepaid and properly addressed, this 18 day of February, 1994.

s/Sam A. LeBlanc, III

APPENDIX L

THE SUPREME COURT OF
THE STATE OF LOUISIANA

GRANT TINGSTROM, III

VS. **NO. 92-C - 2976**

WILLIAM L. SMITH D/B/A SMITTY'S CAB SERVICE, COMCO INSURANCE COMPANY, MISSOURI PACIFIC RAILROAD COMPANY AND UNION PACIFIC RAILROAD COMPANY

IN RE: Missouri Pacific Railrd. Co.; Defendant(s); Applying for Rehearing of an Order of this Court dated February 4, 1994; to the Court of Appeal, First Circuit Number CA90-2283; Parish of West Baton Rouge Eighteenth Judicial District Court Division "C" Number 21,537.

February 25, 1994

Reconsideration Denied.

CDK
WFM
JLD
JCW
HTL
PH

CALOGERO, C. J., not on panel.

Supreme Court of Louisiana
February 25, 1994

s/Frans J. Labranche, Jr.
Clerk of Court
For the Court

APPENDIX M

FIRST CIRCUIT COURT OF APPEAL

STATE OF LOUISIANA

NO. - CA-2283 R

GRANT TINGSTROM, III

VERSUS

WILLIAM L. SMITH D/B/A SMITTY'S CAB SERVICE, ET AL

EMERGENCY MOTION AND INCORPORATED MEMORANDUM FOR AMENDMENT OF JUDGMENT AND STAY OF EXECUTION OF JUDGMENT PENDING AMENDMENT

NOW INTO COURT, through undersigned counsel, comes Missouri Pacific Railroad Company, pursuant to Louisiana Code of Civil Procedure Art. 1951, which moves to amend the judgment rendered on October 15, 1993 by this Honorable Court. Additionally, Missouri Pacific seeks entry of an order staying execution of judgment pending the amendment requested herein.

On October 15, 1993, this Honorable Court rendered judgment finding Missouri Pacific liable to plaintiff under a FELA[1] action for $1,036,823.46, plus costs and interest from the date of judicial demand.[2] The First Circuit's opinion is executory

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[1] Federal Employees Liability Act (45 U.S.C.S. §§ 51 et seq.)

[2] This Honorable Court, as opposed to the district court, rendered the judgment in question and therefore this Motion to Amend is appropriately filed here as opposed to the district court.

and no longer subject to challenge except in the Supreme Court for the United States. However, the judgment contains an error as to phraseology insofar as it awards interest from the date of judicial demand, whereas it is clear that interest can be awarded in a FELA action only from the date of judgment. Missouri Pacific has offered to pay plaintiff the principal amount of the judgment and all interest from the date of judgment in full satisfaction of the judgment. Plaintiff has so far refused to accept this amount and upon information and belief intend to execute the judgment today. In the very near future, Missouri Pacific will deposit into the registry of this Court an amount equal to the principal judgment plus all post-judgment interest, reserving only Missouri Pacific's right to proceed with an Application for Writ of Certiorari to the Supreme Court for the United States. The impending execution of judgment leaves Missouri Pacific with no alternative but to seek an amendment of this judgment and a stay pending the amendment of the judgment.

It is well organized that under FELA claims a successful plaintiff is only entitled to the principal judgment plus any post-judgment interest. See *Monessen Southwestern Railway Co. v. Morgan*, 486 U.S. 330, 108 S.Ct. 1837, 100 L.Ed.2d 349 (1988); *Wildman v. Burlington Northern Railroad Co.*, 825 F.2d 1392 (9th Cir. 1987). In *Monessen*, the Court specifically held that successful plaintiffs are not entitled to pre-judgment interest in FELA claims. This holding was not limited to claims brought in federal court and it specifically requires state courts to follow federal law which precludes the awarding of pre-judgment interest in FELA claims.

Louisiana Code of Civil Procedure Art. 1951 states "a final judgment may be amended by the trial court at anytime, with

or without notice, on its own motion or on motion of any party: (1) to alter the phraseology of the judgment, but not the substance; or (2) to correct errors of calculation." La. Civ. Code Ann. art. 1951 (West 1960). Missouri Pacific seeks a correction only relative to when interest begins to run. This Honorable Court made a technical mistake by including pre-judgment interest in its award to this plaintiff under FELA. By attempting to execute on the judgment, plaintiffs attempt to seek a windfall for which they are not legally entitled and for which there is no basis for support under controlling jurisprudence.

Missouri Pacific has offered to pay the legal amount of the judgment to plaintiffs.[3] Plaintiff has refused to accept the amount he is legally entitled and has stated his intention to execute on the judgment today. Therefore Missouri Pacific has no alternative then to seek this emergency relief.

Accordingly, this Court should grant a temporary stay of execution of judgment and amend the judgment pursuant to LSA CCP Art. 1951 to provide that interest run from the date of judgment, rather than from the date of judicial demand.

---

[3] Exhibit 1, Correspondence to plaintiff's counsel dated March 1, 1994 offering payment of principal amount of judgment and all post judgment interest.

RESPECTFULLY SUBMITTED:
ADAMS AND REESE
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COUNSEL FOR MISSOURI PACIFIC RAILROAD CO.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing EMERGENCY MOTION AND INCORPORATED MEMORANDUM FOR AMENDMENT OF JUDGMENT AND STAY OF EXECUTION OF JUDGMENT PENDING AMENDMENT has been served upon Russell A. Woodard, 114 North Trenton, Ruston, Louisiana 71270 and all other counsel via telefax on this 1 day of March, 1994.

s/B. Troy Villa

VERIFICATION

STATE OF LOUISIANA

PARISH OF EAST BATON ROUGE

BEFORE ME, the undersigned authority, personally came and appeared:

B. TROY VILLA

of the legal age of majority and a resident of the Parish of East Baton Rouge, State of Louisiana, who, being duly sworn, did depose and state:

That he is co-counsel for Missouri Pacific Railroad Company in the above and foregoing Emergency Motion and Incorporated Memorandum for Amendment of Judgment and Stay of Execution of Judgment Pending Amendment, that all of the allegations contained herein are true and correct to the best of his knowledge, information and belief, and that a copy of this Motion and attachments has been served on the Honorable Edward N. Engolio, trial judge, and upon all counsel of record: Mr. Russell A. Woodard, 114 North Trenton, Ruston, LA 71270; Mr. Boris F. Navratil and Mr. David H. Hardy, Navratil, Hardy & Bourgeois, Post Office Box 3551, Baton Rouge, LA 70821; Mr. Rebel G. Ryland, McKeithen & Ryland, Post Office Box 1029, Columbia, LA 71418; and Ms. Janice B. Unland, Aucoin & Unland, 3445 North Causeway Boulevard, Suite 501, Metairie, LA 70002, by telefax and first class mail, on this, the 1 day of March, 1994.

Sworn to and subscribed before me
on this, the *1* day of *March,* 1994.

s/_____
Notary Public

APPENDIX N

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1993

MISSOURI PACIFIC RAILROAD COMPANY and UNION PACIFIC RAILROAD COMPANY,
Applicants

VERSUS

GRANT TINGSTROM, III,
Respondent.

Pending Petition For
Writ of Certiorari To The
Court of Appeal for the First Circuit,
State of Louisiana

APPLICATION FOR
STAY OF EXECUTION OF JUDGMENT
PENDING PETITION
FOR WRIT OF CERTIORARI

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Appendix B: Notice of Denial of Stay Order by Louisiana Supreme Court, Grant Tingstrom, III, v. *William L. Smith, Et Al.*, No. 92-C-2976 (Feb. 24, 1994)

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1993

MISSOURI PACIFIC RAILROAD COMPANY and
UNION PACIFIC RAILROAD COMPANY,
Applicants

VERSUS

GRANT TINGSTROM, III,
Respondent.

Pending Petition For
Writ of Certiorari To The
Court of Appeal for the First Circuit,
State of Louisiana

APPLICATION FOR
STAY OF EXECUTION OF JUDGMENT
PENDING PETITION
FOR WRIT OF CERTIORARI

To: The HONORABLE ANTONIN SCALIA,
Circuit Justice for the Fifth Circuit:

Missouri Pacific Railroad Company ("Missouri Pacific") seeks to stay the execution of a judgment that was rendered against it in a Federal Employe[r]s Liability Act ("FELA") action. Missouri Pacific seeks this relief pursuant to Rules 22 and 23 of the United States Supreme Court and 28 U.S.C. § 2101(f).

As is more fully explained below, in the course of a series of irregular, if not bizarre, procedural steps, the Louisiana Supreme Court adopted the State of Louisiana, First Circuit Court of Appeal's misapplication of federal law as set forth by this Honorable Court, resulting in the reversal of a jury verdict finding Missouri Pacific to be completely free of fault, and instead casting Missouri Pacific in judgment in excess of $1 million.

Because there is a reasonable probability that certiorari will be granted in this case involving a state court's disregard of federal law, a significant possibility that the judgment rendered below will be reversed, and a strong likelihood that Missouri Pacific will suffer irreparable harm if execution of the judgment is not stayed, Missouri Pacific submits that this application for stay should be granted.

I. STATE COURT PROCEEDINGS

On March 6, 1989, Grant Tingstrom, III, filed suit to recover damages he allegedly sustained as a passenger in a taxi which was involved in an automobile accident. At the time of the accident, plaintiff was en route from his motel in Port Allen, Louisiana, to the Missouri Pacific railroad yard at Addis, Louisiana, where he was to operate the locomotive of a work train. Plaintiff's union had negotiated an employment contract with plaintiff's employer, Missouri Pacific, pursuant to which Missouri Pacific provided accommodations to its employees. The motel, an entity completely unrelated to Missouri Pacific, contracted with the taxi service to provide transportation to its guests free of charge.

Plaintiff sued the taxi driver and the taxi service, alleging

that the taxi driver's negligence caused the collision and that the taxi service was liable under a theory of *respondeat superior.* Plaintiff also sued his employer, Missouri Pacific, under the provisions of FELA, alleging that he was in the course and scope of his employment at the time of the accident.

A jury trial was held during which extensive evidence was heard by the jury relative to the details of the accident, as well as evidence relative to the plaintiff's alleged injuries, including testimony of the investigating officer and several physicians who treated the plaintiff. The jury concluded that the plaintiff was not in the course and scope of his employment at the time of the accident and that plaintiff was entitled to only $40,000 of damages.

Plaintiff appealed, and on October 16, 1992, the Louisiana First Circuit Court of Appeal issued a memorandum opinion in which it correctly affirmed the jury verdict in favor of Missouri Pacific under the standard of review applicable in a FELA action. Plaintiff next applied for supervisory writs to the Louisiana Supreme Court. On December 21, 1992, in Case No. 92-C-2976, the Louisiana Supreme Court did not vacate this memorandum opinion, but rather "remanded to the Court of Appeal, First Circuit for a full opinion" more fully explaining its memorandum opinion.

Rather than issuing a full opinion consistent with its memorandum opinion, the Court of Appeal, on October 15, 1993, rendered a second opinion, reversing its original decision which had affirmed the jury verdict in favor of Missouri Pacific.

Missouri Pacific applied for rehearing to the Louisiana First Circuit Court of Appeal, Docket No. 90-CA-2283R; this appli-

cation was denied in a split decision on December 6, 1993. Missouri Pacific also filed applications with the Louisiana Supreme Court for writs of certiorari and/or review, both of which were denied on February 4, 1994.

Most recently, Missouri Pacific applied for rehearing to the Louisiana Supreme Court and also filed an emergency application for a stay of judgment. The Supreme Court denied these on February 24 and 25, 1993, respectively.

In sum, after a jury verdict and an original appellate decision holding Missouri Pacific to be completely free of liability, and in the absence of any opinion by the Louisiana Supreme court holding either to be in error, Missouri Pacific at this point faces a judgment in excess of $1 million.

II. STANDARDS FOR GRANTING STAY

Pursuant to 28 U.S.C. § 2101(f) and recent Supreme Court jurisprudence, three conditions must be met before the Supreme Court will issue a stay: "There must be [1] a reasonable probability that certiorari will be granted (or probable jurisdiction noted); [2] a significant possibility that the judgment below will be reversed; and [3] a likelihood of irreparable harm (assuming the correctness of the applicant's position) if the judgment is not stayed." *Barnes v. E-Systems, Inc. Group Hospital Medical and Surgical Insurance Plan*, 501 U.S. ____, 115 L.Ed.2d 1087, 1090, 112 S.Ct. 1, 12 (1991)(SCALIA, Circuit Justice).

A. Jurisdiction Exists and there is a Reasonable Probability that Certiorari will be Granted

Plaintiff in this matter has brought a claim for damages pur-

suant to the Federal Employers Liability Act ("FELA") and, therefore, a federal question exists. Should the Louisiana Supreme Court deny Missouri Pacific's pending Application for Rehearing, the judgment will be final and the jury's verdict, returned in favor of Missouri Pacific, will have been erroneously reversed. Consequently, this Court has jurisdiction to review the judgment.

After listening attentively to many hours of testimony relative to plaintiff's alleged injuries, medical expenses which may or may not have been necessarily incurred, and wages which may or may not have been lost, the jury returned a verdict against the taxi cab driver for $40,000. In FELA cases, the standard of review to reverse a factual finding of a jury is not merely whether the court finds the jury's verdict to be clearly erroneous, but rather, the higher standard in FELA cases requires the court to find a "complete absence" of probative facts to support the verdict. *Dennis v. Denver and Rio Grande Western Railroad*, 375 U.S. 208, 210, 84 S.Ct. 291, 293 11 L.Ed. 256, 258 (1963) (emphasis supplied). Significantly, with respect to the jury's award of $40,000 for past, present and future pain and suffering, the court of appeal held in its second opinion that the judgment was "unsupported by probative facts," but not that there was a complete absence of probative facts.

The Louisiana First Circuit Court of Appeal decision adopted by the Louisiana Supreme court either misapplied or disregarded the standard for reversing jury verdicts in FELA cases, directly contrary to federal law and prior decisions of this Court. As this Honorable Court has held, consistent application of the laws of the United States and decisions of this Court "are of sufficient importance and a grant of certiorari by

this court is probable." Barnes, 112 S.Ct. at 2, 115 L.Ed.2d at 1090.

B. The Judgment of the Louisiana Supreme Court Should be Reversed

Applying this Court's analysis in Barnes, the second requirement for the grant of a stay requires only that there be a significant possibility that the judgment below will be reversed. In this case, there are compelling reasons to reverse the judgment and at the very least, a significant possibility of reversal exists. As described above, the court of appeals misapplied or ignored the federal standard for reversing a jury verdict in a FELA case. The jury verdict in favor of Missouri Pacific was amply supported by the evidence presented at trial. While this issue will be more fully explored in Missouri Pacific's petition for certiorari to this Court, for the purposes of this application for stay, it is important to note that there was not a complete absence of probative facts upon which the jury verdict was based.

At trial, the jury heard testimony from Mr. Bibbins, a conductor on the work train, and Mr. James Yarborough, a brakeman, both passengers in the taxi cab in which plaintiff was allegedly injured. Both Bibbins and Yarborough testified that throughout the accident, all passengers, including Mr. Tingstrom, remained in their seats.

Second, the jury considered photographs which indicated that there was only a small space between the passengers' knees and the back of the front seat of the cab. This contradicted plaintiff's testimony that he was knocked off his seat.

Third, the jury considered photographs that showed the

location of the door handle on the rear door as recessed and at passenger's thigh level. This contradicted information provided by Mr. Tingstrom to physicians that his back hit the door handle or that he was knocked to the floor between the rear seat and the back of the front seat and the door handle somehow caused scratches on his back.

Fourth, the jury heard testimony from the investigating officer, Mr. John Gehling, that following the accident all occupants of the taxi indicated they had their seat belts on, and that no passenger claimed to have suffered any injuries.

Fifth, the jury heard testimony from Dr. Crittendon, who, after examining Mr. Tingstrom twice and reviewing x-rays and a CT scan, both of which were normal, told plaintiff he could return to work.

Sixth, the jury heard from the Dr. Victor T. Bazzone, a neurosurgeon, who testified that by August 8, 1988, he considered plaintiff fully recovered and released him from his care.

Seventh, the jury heard testimony of a neurosurgeon, Dr. Alan Joseph, who after reviewing all of Mr. Tingstrom's medical records concluded, "[t]here is no disability associated with his injury," but rather only that plaintiff may have sustained a mild back strain from which he should have recovered within a short time. Furthermore, Dr. Joseph testified that he saw no reason for any surgical intervention.

The credibility of a witness and how much weight to give a particular witness's testimony is clearly within the province of the jury. While the seven above-listed items do not comprise the entirety of the testimony heard by the jury, they certainly constitute "probative facts" upon which the jury based its find-

ing of damages of only $40,000. By definition, such evidence precludes a finding of that there was a **complete absence** of probative facts relative to the issue of damages. The jury was entitled to conclude that plaintiff sustained only a moderate back sprain, as testified to by Dr. Joseph, from which he should have recovered within six to 12 weeks, and for which he was entitled to only $40,000 in damages.

With respect to the issue of whether the plaintiff was in the course and scope of his employment at the time of the injury, the court of appeal found the issue to have been improperly submitted to the jury on the belief there was no evidence submitted by Missouri Pacific from which the jury could have concluded that plaintiff was not in the course and scope of his employment. This is wrong. There was significant evidence not only for the issue to be submitted to the jury, but also for the jury to have found in Missouri Pacific's favor, that is, the plaintiff was not in the course and scope of his employment.

Under the standard applied in FELA cases, if Missouri Pacific can point to a single probative fact, then plaintiff cannot secure reversal of the jury verdict under the "complete absence" standard. Missouri Pacific points to the following probative facts: evidence adduced at trial proved that plaintiff was not on call at the time of the accident and, furthermore, that he did not begin to earn wages until he reached the railroad depot and assumed his duties as locomotive engineer on a work train. Thus, there was also insufficient basis under the applicable standard to reverse the jury's verdict on the course and scope issue.

Therefore, the Louisiana Court of Appeal's second opinion adopted by the Louisiana Supreme Court violates clear United

States Supreme Court precedent in erroneously supplanting the jury's verdict with its own. *Dennis v. Denver and Rio Grande Western Railroad,* 375 U.S. 208, 84 S.Ct. 291, 11 L.Ed.2d 256 (1963).

C. Missouri Pacific Will Suffer Irreparable Harm if the Judgment is Not Stayed

Missouri Pacific will suffer great hardship if plaintiff is allowed to execute the judgment. If plaintiff begins seizing Missouri Pacific's assets, and this Honorable Court reverses the judgment, Missouri Pacific would be forced to go to great lengths to reinstate the current status quo. In fact, it is very likely that Missouri Pacific would be unable to recover the seized assets from plaintiff if such an event were to occur.

As Justice Scalia noted in *Barnes*, "[i]t is ultimately necessary...to balance the equities—-to explore the relative harms to applicant and respondent, as well as the interest of the public at large." *Barnes,* 112 S.Ct at 3, 115 L.Ed.2d 1091. Missouri Pacific stipulates that a stay may be entered pursuant to this Honorable Court requiring the posting of security, and Missouri Pacific stands ready to furnish any necessary security to cover any and all damages plaintiff could conceivably suffer as a result of the grant of the stay. This completely removes the possibility plaintiff would suffer any harm as a result of the grant of the stay. Additionally, because the interests of the public are not at issue in this case, the balance of equities weighs in Missouri Pacific's favor and should not prevent the grant of petitioner's application for stay.

CONCLUSION

At issue in this case is the misapplication and/or disregard of federal law and thus, there is a reasonable probability that certiorari will be granted. The jury's verdict in favor of Missouri Pacific in this FELA case was well supported by the facts that were presented to the jury at trial. As a result, there is a significant possibility that the judgment will be reversed in this case. Finally, Missouri Pacific will suffer irreparable harm should the stay not be granted. For the foregoing reasons, Missouri Pacific respectfully requests that this Honorable Court grant its application for a stay order.

Respectfully submitted,

ADAMS AND REESE

By:s/_____
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Attorneys for Applicants,
Missouri Pacific Railroad Company
and
Union Pacific Railroad Company

*Counsel of Record

APPENDIX O

SUPERSEDEAS BOND

IN THE SUPREME COURT OF THE UNITED STATES **DOCKET NO.:_____**

MISSOURI PACIFIC RAILROAD d/b/a UNION PACIFIC RAILROAD —
Applicant/Defendant Below

VERSUS **CASE NO._____**

GRANT TINGSTROM, III —
Respondent/Plaintiff Below

KNOW ALL MEN BY THESE PRESENTS, that we, MISSOURI PACIFIC RAILROAD d/b/a UNION PACIFIC RAILROAD, as Principal, and SAFECO INSURANCE COMPANY OF AMERICA, a Washington corporation, as Surety, are held firmly bound unto GRANT TINGSTROM, III, and his attorneys, RUSSELL A. WOODARD and REBEL G. RYLAND, in the amount of ONE MILLION FIVE HUNDRED FIFTY THOUSAND ($1,550,000) DOLLARS, for the payment of which we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents:

WHEREAS, the said MISSOURI PACIFIC RAILROAD d/b/a UNION PACIFIC RAILROAD is petitioning the United States Supreme Court for a Writ of Certiorari, to review the decisions of the Court of Appeal, First Circuit, and the Supreme Court of the State of Louisiana in proceedings

recently pending before them, bearing docket number 93/CA/0278 on the docket of the Louisiana Court of Appeal, First Circuit, and bearing docket numbers 92/C/2976, 93/C, 2776 and 94/C/0031 on the docket of the Louisiana Supreme Court, wherein the said GRANT TINGSTROM, III, was the Plaintiff, and MISSOURI PACIFIC RAILROAD d/b/a UNION PACIFIC RAILROAD was the Defendant:

NOW THEREFORE, the condition of this obligation is that if the said MISSOURI PACIFIC RAILROAD d/b/a UNION PACIFIC RAILROAD shall pay all costs, disbursements incurred and judgments resulting from the said Application for a Writ of Certiorari, then this obligation shall be null and void and released, otherwise, to remain in full force and effect, provided however that the maximum liability of the Surety shall not exceed ONE MILLION FIVE HUNDRED FIFTY THOUSAND ($1,550,000) DOLLARS.

IN WITNESS WHEREOF, MISSOURI PACIFIC RAILROAD d/b/a UNION PACIFIC RAILROAD, as Principal, and SAFECO INSURANCE COMPANY OF AMERICA, as Surety, have hereunto set our hands this 4th day of March, 1994.

WITNESSES:

_____

_____

s/KristenHaskell
s/Jerry Pierce

MISSOURI PACIFIC RAILROAD
d/b/a UNION PACIFIC RAILROAD,
Principal

By: s/Boris F. Navratil
BORIS F. NAVRATIL,
Attorney and Agent
Pro Hac Vice

SAFECO INSURANCE COMPANY OF
AMERICA, Surety

BY: s/David G. Jesse
Attorney in Fact
David G. Jesse

s/David B. Tidmore
David B. Tidmore, Louisiana
Resident, Agent,
License #114461

A-115

POWER OF ATTORNEY

SAFECO INSURANCE COMPANY OF AMERICA
GENERAL INSURANCE COMPANY OF AMERICA
HOME OFFICE: SAFECO PLAZA
SEATTLE, WASHINGTON 98185

NO. 0784

KNOW ALL BY THESE PRESENTS:

That **SAFECO INSURANCE COMPANY OF AMERICA and GENERAL INSURANCE COMPANY OF AMERICA,** each a Washington corporation, does each hereby appoint HARRY A. KOCH, JR.; DOUGLAS G. DURBIN; D.M. STOKES; HARRY D. KOCH; PEGGY SAPIENZA; DAVID G. JESSE, Omaha, Nebraska its true and lawful attorney(s)-in-fact, with full authority to execute on its behalf fidelity and surety bonds or undertakings and other documents of a similar character issued in the course of its business, and to bind the respective company thereby.

IN WITNESS WHEREOF, SAFECO INSURANCE COMPANY OF AMERICA and GENERAL INSURANCE COMPANY OF AMERICA have each executed and attested these presents

this 4th day of January, 1993

s / R. A. Pierson

s / Dan D. McGea

CERTIFICATE
Extract from the By-Laws of SAFECO INSURANCE COMPANY OF AMERICA and of GENERAL INSURANCE COMPANY OF AMERICA

"Article V, Section 13. – FIDELITY AND SURETY BONDS . . . the President, any Vice President, the Secretary, and any Assistant Vice President appointed for that purpose by the officer in charge of surety operations, shall each have authority to appoint individuals as attorneys-in-fact or under other appropriate titles with authority to execute on behalf of the company fidelity and surety bonds and other documents of similar character issued by the company in the course of its business . . . On any instrument making or evidencing such appointment, the signatures may be affixed by facsimile. On any instrument conferring such authority or on any bond or undertaking of the company, the seal, or a facsimile thereof, may be impressed or affixed or in any other manner reproduced; provided, however, that the seal shall not be necessary to the validity of any such instrument or undertaking."

Extract from a Resolution of the Board of Directors of **SAFECO INSURANCE COMPANY OF AMERICA** and of **GENERAL INSURANCE COMPANY OF AMERICA** adopted July 28, 1970.

"On any certificate executed by the Secretary or an assistant secretary of the Company setting out,

(i) The provisions of Article V, Section 13 of the By-Laws, and

(ii) A copy of the power-of-attorney appointment, executed pursuant thereto, and

(iii) Certifying that said power-of-attorney appointment is in full force and effect, the signature of the certifying officer may be facsimile, and the seal of the Company may be a facsimile thereof."

I. R. A. Pierson, Secretary of **SAFECO INSURANCE COMPANY OF AMERICA** and of **GENERAL INSURANCE COMPANY OF AMERICA,** do hereby certify that the foregoing extracts of the By-Laws and of a Resolution of the Board of Directors of these corporations, and of a Power of Attorney issued pursuant thereto, are true and correct, and that both the By-Laws, the Resolution and the Power of Attorney are still in full force and effect.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the facsimile seal of said corporation

this 4th day of March, 1994

s / R. A. Pierson
Secretary